LAW AND CONTEMPORARY PROBLEMS

INTERTERRITORIAL FREIGHT RATES

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FOREWORD

To the present generation the thesis has long been familiar that ". . . the South is our 'Economic Problem No. 1,' because, among other things, it is low in industrial development, and that a major reason for this condition has been and is an unfair adjustment of freight rates which has favored the producers of the North and burdened those of the South."[1] More recently similar complaints have been advanced on behalf of the West. Few, however, have been in position to form an intelligent judgment on the merits of the question. Those who took their information from publicists on either side of the controversy were met with a welter of contradictory assertions and paradoxes; those who sought to inquire for themselves encountered a forbidding complex of railroad lore, transportation economics, cost accounting, and esoteric law impenetrable except by the rate specialist. Why should southern railroads resist rate adjustments which allegedly would stimulate industry along their lines, to their obvious advantage? Why should eastern railroads resist increases in their own rates, which would be to their apparent advantage? Why are some southern interests apathetic toward the whole agitation for rate reform? Why are some recognized leaders in the campaign for reform hostile to Governor Arnall's strategy of carrying the fight to the courts?

It is said that differences in the cost of transportation between North and South justify different rate levels; it is also said that there are no such differences, or, if there are, they are the other way around. It is said that differences in something called the "consist" of traffic, having to do with the "distribution of the transportation burden," justifies different rate levels; this is denied. It is said that the Interstate Commerce Commission should be left alone to regulate the affairs of the railroads, and that other government agencies, particularly the Department of Justice, should keep hands off; it is also said that railroad rates are fashioned in an atmosphere of monopoly which renders administrative regulation ineffective. It is said that only class rates are in issue, and that they are of trifling importance to the economy; it is also said that the class-rate structure operates as a tariff wall which keeps the South and West in a state of colonial subjection and concentrates industry, wealth, and population in the East. It is said that the South and West are attempting to hamstring the East, to attain equality by depriving that section of natural

[1] The quoted language is that of the late Joseph B. Eastman, Chairman of the Interstate Commerce Commission, dissenting in the Southern Governors' Case (Alabama v. New York Central R. R.), 235 I.C.C. 255, 333 (1939).

advantages; it is said on the other side that the attempt is solely to remove artificial, man-made barriers. The relation between rate levels and wage levels in the different sections is a perplexing question of cause and effect: low wage levels in the South are justified as an enforced compensation for discriminatory rates; on the other hand there has been more than a suggestion that rate differentials have been maintained in the interest of eastern manufacturers as protection against unfair competition from low-wage industries in the South.[2]

As Professor Potter shows in his article in this symposium, complaints of rate discrimination against the South can be documented as far back as the turn of the century. It was not until after the First World War, however, that the subject received widespread attention. In the Twenties and Thirties, largely as the result of efforts of the Southern Traffic League and the Southern Governors' Conference, the Commission ordered various adjustments in interterritorial rates,[3] changing the method of constructing them and altering relationships for specific commodity groups. In 1937 Mr. J. Haden Alldredge, then Principal Transportation Economist for the Tennessee Valley Authority, completed the first definitive analysis of the interterritorial rate problem[4]—a work which became and has remained the manifesto of the southern forces. Transmitting the Alldredge report to the President, Chairman Morgan of the TVA said:

> This survey shows that the present territorial freight-rate boundaries, which are the outgrowth of tradition, constitute barriers against the free flow of commerce which are hampering and restricting the normal development of the Nation as a whole by preventing a full utilization of the varied natural resources that exist in the different regions of the country. It reveals that the existence of these barriers tends to retard substantially the commercial and economic development of the Tennessee River drainage basin and adjoining areas in the South. The report suggests that the establishment of a uniform principle of making interterritorial freight rates will aid the commercial development of such regions as the Tennessee Valley and redound to the benefit of the Nation as a whole.[5]

[2] In Cotton, Woolen, and Knitting Factory Products, 211 I.C.C. 692, 786 (1935), and again in the Southern Governors' Case, cited *supra*, note 1, at 320, northern interests offered evidence showing the disparity between wage scales in the North and in the South. In both cases the evidence was excluded, the Commission holding that costs of production of competing producers are not matters which may properly be considered in determining lawful transportation charges. It is possible that the enactment of the Fair Labor Standards Act in 1938 was facilitated by the progress which was being made by southern interests in the campaign to eliminate freight differentials (*cf.* Potter, *The Historical Development of Eastern-Southern Freight Rate Relationships, infra,* and the Commission's oblique reference to the Act in the Southern Governors' Case, at 320); and it may be significant that, following the Supreme Court's affirmance of the *Class Rate Decision*, a Republican Congress is showing interest in an upward revision of the minimum wage standards. Assuming that differentials in freight rates have been maintained, at least in part, to offset the competitive advantages which southern producers derive from lower wage scales, it must certainly be conceded that minimum wage legislation is the better approach to a solution of the problem.

[3] Southern Class Rate Investigation, 100 I.C.C. 513 (1925); Rates from, to, and between Points in Southern Territory, 191 I.C.C. 507 (1933); Alabama v. New York Central R. R., 235 I.C.C. 255 (1939).

[4] THE INTERTERRITORIAL FREIGHT RATE PROBLEM OF THE UNITED STATES, H. R. Doc. No. 264, 75th Cong., 1st Sess. (1937). Mr. Alldredge is now a member of the Interstate Commerce Commission, having been appointed by President Roosevelt in 1939.

[5] *Ibid.*

Two recent developments make the present symposium timely. First, the Interstate Commerce Commission, in May, 1945, as the climax of two comprehensive investigations which it had undertaken on its own initiative in 1939, ordered: (1) that a uniform national system of classification of freight for rate-making purposes be substituted for the several different territorial classifications; (2) that a uniform scale of intraterritorial and interterritorial class rates, prescribed by the Commission, be made effective simultaneously with the new classification; and (3) that, by way of mitigating the inequalities in the rate structure during the period which would be required to work out the rate adjustments and the uniform classification which had been prescribed, class rates in the East be increased 10 per cent, and those in the rest of the country east of the Rocky Mountains reduced by the same percentage, with corresponding changes in the interterritorial class rates.[6] Second, efforts to attack the problem from a different angle, which had been in progress in the meanwhile,[7] came to the fore at about the same time. In March, 1945, the State of Georgia was granted leave to file in the United States Supreme Court a suit charging some twenty eastern and southern railroads with conspiring, in violation of the Sherman Antitrust Act, to fix rates which discriminated against that state;[8] and the United States, through the Department of Justice, filed suit in a district court at Lincoln, Nebraska, against the Association of American Railroads, the Western Association of Railway Executives, the western railroads generally, and two New York banking houses, charging, among other things, a conspiracy to impose upon the West the same kind of rate discriminations which were complained of by the State of Georgia.[9] Notwithstanding the fact that the Commission's sweeping decision in the *Class Rate* case appeared to crown the efforts of southern and western interests with complete success, these antitrust suits have been pressed and are still pending, involving issues which appear to be of major importance to both sides.

The aim of this symposium is to find answers to as many as possible of the

[6] Class Rate Investigation, 1939, 262 I.C.C. 447 (1945). The requirement of a uniform classification extended to the whole country; the rate adjustments ordered did not apply to mountain-Pacific territory, which is the area from the Rocky Mountains west. The Commission gave the railroads, and they accepted, the opportunity of working out the uniform classification by agreement among themselves. A group of eastern states and western railroads filed suit in a three-judge court to set aside the order as to the rate adjustments, and that court, while upholding the Commission's order, granted an injunction pending appeal. See Miller, *Corrective Action by the Interstate Commerce Commission, infra.* The effect was to suspend the Commission's order and leave the old rate relationships in effect until the case could be finally determined by the Supreme Court. The final determination came in May, 1947.

[7] Proponents of rate reform had appealed to the antitrust laws, indirectly at least, as far back as 1939. In the Southern Governors' Case the Commission said: "Complainants . . . contend that the northern carriers, by cooperation and agreement among themselves and by absorption of roads in the North which otherwise would have been competitive in making rates from the South, restrain the freedom of action of the southern carriers in the establishment of interterritorial rates in violation of the antitrust laws, and that in view of this such rates must be presumed to be unreasonable and unlawful. They admit that we are without authority to enter orders requiring compliance with such laws, but they insist that we should give consideration to the presumption, above stated, which they contend arises from violation thereof. We shall make no findings herein with respect to the alleged violation of the antitrust laws." Alabama v. New York Central R. R., 235 I.C.C. 255, 309-310 (1939).

[8] Georgia v. Pennsylvania R. R., 324 U. S. 439 (1945).

[9] United States v. Association of American Railroads, 4 F. R. D. 510 (1945).

questions which confront one who seeks to be informed on these matters. To a substantial degree this aim has been attained in the group of articles which follows. Not that the contradictions mentioned have been dissipated: partisan viewpoints are represented, and disagreements are sharp. But the materials necessary for the formation of a critical judgment are here. To be sure, conclusions will not always be suspended ripe for the plucking. The discriminating reader, however, will find guides, familiar to triers of fact, in his appraisal of the interests involved, in the candor and completeness with which issue is joined,[10] and in the inferences which can be drawn from undisputed facts.

The first question, of course, relates to understanding the problem. Professor Milton S. Heath, in his discussion of the rate structure, not only supplies the foundation necessary for an understanding of the articles which follow but, as an economic theorist, examines the transportation rate pattern as a species of price behavior.

The second important question is, How did the rate structure come to be? In his study of this question Professor David M. Potter, a historian, makes a unique contribution to the literature and the understanding of this subject. Apart from the historical sketches embodied in various reports of the Commission, no account has been available of the forces and conditions which so molded the rate structure as to bring about the profound controversies of recent years.

It is essential, next, to know how railroad rates are made. A common lay mistake is to suppose that they are all prescribed by the Interstate Commerce Commission. Actually, of course, they are initiated by the railroads themselves and merely filed with the Commission, and the rate-fixing power of the regulatory agency is called into play only upon the complaint of some interested party, or in a general investigation of rate relationships (a few typical examples of which have been referred to), or in a "revenue" proceeding in which the adequacy of the return provided by the rate level is examined. In the third article Mr. Wendell Berge, formerly Assistant Attorney General in charge of the Antitrust Division, goes beyond these primary facts and discusses in detail the procedures, involving consultation with shippers and conferences with other carriers, by which the railroads arrive at the rates which they file—those rate conferences and appellate procedures which have been termed a "private system of judicature" and which have been bitterly assailed as the means by which sectional interests accomplish their discriminatory ends. In doing so Mr. Berge of course expresses the viewpoint of the Department of Justice and the State of Georgia—a viewpoint which is vigorously challenged by Mr. John Dickinson, General Counsel of the Pennsylvania Railroad, in his article defending the value, the function, and the necessity of the rate conferences, which follows. These two articles, together with Mr. Alderman's and Mr. Wiprud's, to be mentioned later, bring to light the whole conflict of philosophies which is involved in the antitrust approach to the rate question: the view, on the one hand, that the policy of free and

[10] Remembering, however, that these contributors have had no opportunity to read other papers in the symposium prior to publication.

unhampered operation of competitive forces which underlies the Sherman Act cannot be applied to a regulated industry such as the railroads, and that the railroads have duties under the Interstate Commerce Act which can be discharged only by use of the conference method; the view, on the other hand, that the area of collaboration contemplated by the Interstate Commerce Act is a restricted one, and that the necessary functions of the rate conferences can be performed in such a way as not to run counter to the prohibitions of the antitrust laws. Now that the Supreme Court has upheld the order of the Commission looking toward uniformity of class rates, this is the great unresolved issue.

The next question is whether the regional differences in class-rate levels can be justified on the basis of differences in cost, differences in the consist of traffic, or other differences in transportation conditions—or on any ground of relevant economic policy. This question, which was of course the Commission's principal concern in the *Class Rate* case, is authoritatively discussed by Professor D. Philip Locklin, one of the country's foremost transportation economists.

Many people, generally familiar with the interterritorial rate controversy, have wondered whether the sound and fury is not out of all proportion to the real effects of rate differentials. Do the class rates (these being the only rates which are concededly on different sectional levels) affect a significant portion of the traffic? Are the differences really significant competitive factors, capable of influencing the location of industry and the concentration of population? Suppose the rate on overalls from a southern factory to an eastern market *is* 28 cents per hundred pounds higher than the rate to the same market from a competing factory in the East, the same distance from that market: what is 28 cents per hundred pounds, translated into the retail price of a pair of overalls?[11] Is it enough to change the face of a nation? These and other related questions are considered by Mr. Frank L. Barton, Chief Economist of the Department of Justice, in his analysis of the economic effects of regional rate differentials.

Since this question of economic effects is a crucial one, and since the affirmance of the *Class Rate* decision probably does not mark the end of the road to rate equalization,[12] the article which is included at this point should be of particular interest to those who will be concerned with future developments. Mr. James C. Nelson, Chief of the Transportation Division in the Office of Domestic Commerce,

[11] Perhaps the most succinct comment responsive to such questions is that of the Commission in the Southern Governors' Case: "When the important products of one producing section are subjected to a higher level of rates to [common] markets than are like products of adjacent competing producing sections less distant to such markets, it generally cannot develop unless, and then only to the extent that, the differences in transportation charges can be offset by lower production costs or absorbed by a reduction in profits. And even though differences in transportation charges can be thus offset or absorbed, this in itself generally tends to retard its growth and prosperity." Alabama v. New York Central R. R., 235 I.C.C. 255, 319-320 (1939).

[12] The Commission's order increasing eastern rates by 10 per cent and reducing those in the rest of the country east of the Rockies by the same percentage was, it will be recalled, an interim order. It has been estimated that it may take years for the railroads to comply with the basic order of the Commission calling for a uniform classification and for uniform class rates. It will also be recalled that the rate order did not apply to that extensive and rapidly developing section known as mountain-Pacific territory.

outlines the information which should be obtained and the methods which should be followed in research for the purpose of determining statistically the economic effects of rate differences.

In the next article Mr. Edward H. Miller, formerly Special Assistant to the Attorney General and counsel for the Government in the *Class Rate* case, discusses the corrective action taken by the Interstate Commerce Commission in that case, with particular reference to the legal questions involved. Written before the announcement of the Supreme Court's decision reviewing that case, this article nevertheless constitutes an informed commentary on that decision because of its detailed analysis of the issues later decided by the Supreme Court.

The next two articles return to the antitrust aspects of the rate problem, which have been mentioned in connection with Mr. Berge's analysis of the rate-making process and Mr. Dickinson's defense of the rate-conference procedure. Mr. Arne C. Wiprud, formerly Special Assistant to the Attorney General in the Antitrust Division, discusses specifically the *Georgia* case and the suit against the western railroads, while Mr. Sidney S. Alderman, General Counsel of the Southern Railway, contributes a spirited statement of the position of the southern carriers with particular reference to the issue of dual control.

It is natural that the emphasis, thus far, has been upon those interregional rate relationships which were the subject of the Commission's historic investigation in the *Class Rate* case; but the very omission from the order of rates in the Far West highlights the importance of that region for the future. The great distances which separate the Pacific Coast from the rest of the country, the mountain ranges which wall it off, the competition from water carriers, the burgeoning industrial economy of the western cities, the postwar economic problems which may result from the great wartime migration to the Coast, all make for fascinating transportation problems. Thus the article by Professor Stuart Daggett, another outstanding transportation economist and a student of California affairs, is of particular interest and value in the presentation of a well-rounded exposition of the national transportation problem.

Finally, a symposium such as this requires a summing up, a statement of the long view, a study relating the problem of regional rate differentials to the total problem of an efficient transportation system operating in the interests of the American people—a study, in short, of national transportation policy. There could hardly be a better choice for such a task than a railway executive who, while he has broken with tradition on many issues, is a passionate crusader for a sound transportation system. Mr. Robert R. Young, Chairman of the Board of the Chesapeake & Ohio, is well known for the battles he has fought in the name of progressive railroading. There is no doubt that he is the most invigorating force which has appeared in the

In addition, the order dealt only with class rates, on which, concededly, only a minor fraction of all rail traffic moves; it was not concerned with commodity rates, exception rates, and column rates, which move the rest. While the Commission's intentions are not known, it is a fair assumption that in due course some or all of these may come under investigation, to have any regional differences that may appear judged by the standards of uniformity in the light of territorial transportation conditions.

industry in a generation. Among other railroad men he is regarded both as an insurgent and as an effective champion. In his paper Mr. Young discusses *A National Transportation Policy*—not merely "the" National Transportation Policy, as if the declaration by Congress in 1940 were immutable. In addition to commenting forthrightly on both branches of the interterritorial rate struggle—the merits of the *Class Rate* decision and the resort to the antitrust laws—Mr. Young discusses conditions which he regards as defects in the National Transportation Policy, as causes contributing to discrimination, and as obstacles which must be overcome before disputes over discrimination can be effectively dealt with.

While this symposium was in preparation there were other important developments. Most prominent, of course, was the Supreme Court's confirmation of the *Class Rate* decision, the operation of which had been suspended during two years of litigation. The Supreme Court's decision, announced May 12, 1947,[13] came after all except two of the papers in this symposium had been completed, and there was no opportunity for revisions which would permit the contributors to express their reactions. It therefore falls to the Editor to make some comment on the decision.

The vote was seven to two, and Justice Douglas wrote the opinion for the majority. Justice Frankfurter dissented; Justice Jackson wrote a separate dissenting opinion concurred in by Justice Frankfurter.

The principal holdings of the majority closely parallel the findings of the Commission and the analysis of the legal issues presented in Mr. Miller's article:

1. The Commission did not misconceive its authority in its approach to the elimination of discrimination; it did not attempt to impose uniform freight rates, mile for mile, without regard to differing costs of service, but only to eliminate territorial rate differences which were not justified by differences in territorial conditions.

2. The Commission's findings of discrimination in class rates in favor of eastern territory and against the other three territories were supported by substantial evidence.

3. The force of those findings is not impaired by the alleged absence of a finding that the discriminatory rates are actually charged to competing shippers in the several territories. There was some showing of actual discrimination against shippers; however, the issue was not discrimination against individual shippers located in a territory, but prejudice to a territory as a whole. Since the effect of discriminatory rates is not only to impede established industries but to prevent the establishment of new ones, an unlawful discrimination is not dependent on a showing of actual injury to individual shippers—otherwise a case could never be made out against completely effective discrimination, which would operate to shut out entirely shipments from the competing region.[14]

[13] New York v. United States, 67 Sup. Ct. 1207 (1947).

[14] Here is one of the choice paradoxes of the whole controversy. Both sides sought to make capital of the admitted fact that class rates move but a minor portion of the freight, and that most of that moves in official territory. The plaintiffs relied on the fact that class rates had become "paper" rates as showing that the discriminations supposed to flow from differences in regional levels were speculative and unreal; the Commission found, and the Court agreed, that their very obsolescence tended to establish their effectiveness as a trade barrier.

4. There was substantial evidence to support the Commission's finding that the class-rate structure had prejudiced the economic development of the South and the West.

5. The finding that rate differences between the East and the South were not justified by differences in cost nor by differences in the consist of traffic was amply supported by the evidence. As for differences between the East and the West, while the evidence showed slightly higher costs in the West, the Commission was justified in taking into account the probable level of costs in the postwar period, the rate of return on investment in the territories, the territorial freight operating ratios, the low level of intrastate rates in the West, and the probable increase in class traffic resulting from the reduction in interstate class rates, and in concluding that these considerations counterbalanced the disparity in costs. Here the Court emphasized the latitude accorded an expert administrative body in forming judgments on matters within its special competence.

6. A relatively minor aspect of the case gave the Court some difficulty. The Commission's rate reduction order had applied to less-than-carload as well as carload rates. The western roads maintained that as to this type of class rates the case of discrimination had not been made out, and also that the rates were confiscatory. The Court's treatment of this contention is interesting primarily because it involves some technicalities of administrative law. On the issue of confiscation the western railroads presented to the district court new evidence which had not been placed before the Commission, and the district court received and considered it. Pointing out that correct practice requires that all such evidence be considered in the first instance by the administrative agency, Justice Douglas said that but for the provisional character of the Commission's order it would be necessary to remand the case to the Commission for preliminary consideration of the new evidence. On the merits, the Court noted that the data on costs for less-than-carload traffic were out of date and not confined to traffic moving on class rates; that such costs are largely within the control of the railroads, depending largely on the efficiency of loading and related factors; that, even so, the Commission had calculated that the new rates would be compensatory if wartime loading practices were continued; and, above all, that the Commission's order on this point was extremely tentative, the railroads having been expressly admonished by the Commission to apply for a readjustment of less-than-carload rates promptly if experience should indicate the need. As to the argument that discrimination in these rates had not been established, it was held that the Commission, having found discrimination in the main features of the rate structure, was justified in modifying less-than-carload rates along with the rest to avoid upsetting competitive relations between those who ship in small quantities and those who ship by the carload.

7. The Commission's order was not defective because it failed to afford the carriers an opportunity to "abate the discrimination by raising one rate, lowering the

other, or altering both," nor because there might be no group of carriers which could be regarded as the "common source" of the discrimination.[15]

8. The Commission acted within the limits of its authority to remove discrimination in ordering an *increase* of 10 per cent in class rates in the East, on the basis of its finding that those rates were not only unduly preferential but also unreasonably low, despite the fact that there was no finding that those rates were noncompensatory, or that they otherwise threatened harmful effects upon the revenues and transportation efficiency of the eastern carriers or their competitors.

9. The Commission's order in the *Class Rate* case was not rendered obsolete by its later action granting a nationwide increase in freight rates, with greater increases in the East than in the rest of the country.[16]

Justice Frankfurter, invoking standards which the Court had applied in less momentous cases, complained of lack of definiteness, clarity, and explicitness in the Commission's findings, particularly as to the reasonableness of the new rates to be established by the interim order. To him the addition of 10 per cent in one territory and the "mathematical coincidence" of a reduction of the same amount in the others were an apparently mechanical and Procrustean procedure for getting rid of differences, which could be supported, if at all, only by digging out of the voluminous record "inexplicit, argumentative" bits.

It is, in fact, the method which the Commission employed to remove the discriminations which it found that presents the greatest difficulty to the commentator, as it did to the Court and, one may guess, to the Commission itself as its investigation went forward. The rulings of the Court on the other issues—those, for example, dealing with the findings of discrimination, of its effects upon the industrial development of the South and West, and of the lack of justification in different transportation conditions—are of the type to be expected as a matter of course when a court is called upon to review the painstaking exercise of administrative functions. One may disagree with the conclusions reached by the Commission on the basis of

[15] The legal arguments to which this holding is addressed are discussed in Miller, *Corrective Action by the Interstate Commerce Commission, infra.*

[16] *Ex parte* No. 162, 264 I.C.C. 695, 266 I.C.C. 537 (1946).

On July 7, 1947, petitions for rehearing in New York v. United States having been denied (67 Sup. Ct. 1527, 1528 (1947)), the Commission issued its Second Supplemental Report in Docket No. 28300, the Class Rate Investigation, instructing the railroads to proceed with the adjustments ordered in that investigation. The procedure prescribed by the Commission for accommodating those adjustments to the general increases permitted in *Ex parte* 162 was as follows: (1) The rates in effect at the time of the order in the Class Rate case, in 1945, are to be increased by 10 per cent in eastern territory and decreased by 10 per cent in the other affected territories and interterritorially, as provided in the interim order; (2) thereupon, the rates so adjusted may be increased uniformly by 22½ per cent in lieu of the varying percentages originally allowed (25 per cent in the East, 20 per cent in the South and West, and 22½ per cent interterritorially) in *Ex parte* 162. The effect is to adhere closely, percentage-wise, to the degree of equalization contemplated by the interim order. If the delayed equalizing adjustments had been superimposed on the rate structure resulting from *Ex parte* 162, or if the increase originally authorized in *Ex parte* 162 had been superimposed on the 1945 structure as modified by the interim order, the change in the percentage relationships between the regional levels would have been accentuated. However, the absolute competitive disadvantage to the average southern shipper will be greater than it would have been originally under the interim order or under either alternative method of accommodating the two adjustments.

the monumental record in the *Class Rate* case, but it would require an extraordinary projection of the courage of one's convictions to maintain that there was not enough there to support those conclusions as the judgments of reasonable men.

Justice Frankfurter's incredulity concerning the "mathematical coincidence" of the 10 per cent adjustments can probably be dismissed as resulting from failure to give sufficient recognition to the interim character of those adjustments. Primarily, the Commission ordered rate equality—a clear-cut concept dependent on no preconceived percentages—and prescribed the uniform rates which were ultimately to apply. Those rates could not be made effective, however, until the uniform classification was completed; and so the Commission, frankly to approximate the desired equality in the interim, ordered the 10 per cent adjustments. This, however, does not dispose of the fundamental point, which is that the Commission's method of eliminating the differentials which it found unlawful was essentially that of splitting the difference.

Consider the problem: The Commission had found differences in territorial rate levels which it regarded as discriminatory and as unjustified by differences in transportation conditions such as costs of service. It followed that there should be equality; but which set of rates was out of line, which required adjustment? To achieve equality by cutting southern and western rates down to the level of those in the East might have entailed serious revenue problems for the southern and western carriers. The Commission found *both* that rates in the South and West were too high and that those in the East were too low, and that there should be corresponding mutual adjustments. It is just at this point that the difficulty arises, for raising rates without a showing that they are inadequate for revenue purposes involves troublesome problems of construction of the Interstate Commerce Act. Any other method of equalization, except that of cutting all rates to the eastern level, would have involved the same problem in greater or less degree. If the order had been to cut southern and western rates by 11.6 per cent and raise eastern rates by 8.4 per cent the "mathematical coincidence" would have disappeared, but the essential problem would have remained: Was the increase in eastern rates defensible?

The Interstate Commerce Act prescribes standards, or ideals, for railroad rates which in the aggregate call for a perfection that few human institutions can attain. They must not be unjust or unreasonable or unlawful in any respect "in and of themselves or in their relation to each other"; they must not discriminate against any person, company, firm, corporation, locality, category of traffic, port, port district, gateway, transit point, region, district, or territory; they must produce enough revenue to permit adequate and efficient railway transportation service, but generally no more than is required to cover the lowest cost consistent with the furnishing of such service, plus a fair return on the property used in rendering it. The Commission was confronted with a difference in rates which it found unjustified by differences in transportation conditions, and which should therefore be eliminated as a

discrimination under the Act; yet there was no showing that eastern rates were too low by reference to the revenue standards of the Act.

The way out of this dilemma involves a concept which is not easy for the uninitiated in rate matters. There is probably no such thing as a railroad rate or group of rates which is just precisely right—which is both the maximum and the minimum from the standpoint of reasonableness for revenue purposes, and which cannot be raised a bit or lowered a bit without violating the Act. Such a rate would indeed be a mathematical coincidence, and an economic one as well. There is, in fact, as the majority of the Court recognized, a "zone of reasonableness" for revenue purposes within which rates can be adjusted down or up without depriving the affected carriers of a fair return, impairing the efficiency of their service, subjecting them or their competitors to ruinous competition, or imposing an excessive burden on shippers and consumers.[17] Such a zone, such a play between parts of the stautory scheme which might be expected to mesh with precision, may be difficult to accept; there is, however, no way of avoiding it. It results from our inability to allocate joint costs without some margin of error, from our inability to foresee precisely the effects of rate adjustments on traffic in the future, and generally from the immensurability of such concepts as those of which the revenue standards of the Act are compounded.

Simple acceptance of the fact that there is such a zone is all that is necessary to render the Commission's method understandable. Let it be conceded that eastern rates were not below the bottom of the range of reasonableness for revenue purposes, and that southern and western rates were not above the top; nevertheless the disparity between them as they were disposed within the range, being unjustified by differences in transportation conditions, was found by the Commission to be unlawful and subject to correction. For such adjustments within the zone no standard would appear to be available except that of equality; and in this light the Commission's decision as an interim expedient to move each group equally toward the midpoint, rather than to employ some elaborate formula which might result in a different point nearby, takes on the aspect of practical statesmanship.

It was this matter of raising eastern rates which troubled Justice Jackson, although the warmth of his feeling led him also to express other, much less tenable, objections to the Commission's order. His dissenting opinion, which begins, "I find it impossible to agree with this extraordinary decision," is itself remarkable. He refers to the eastern rate increase as a "surtax," or "surcharge," not needed by the eastern roads for revenue purposes but added for the purpose of handicapping the economy of that region.[18] We have seen that such a reaction is not unnatural in view of the

[17] United States v. Illinois Cent. R. R., 263 U. S. 515, 524 (1924); Youngstown Sheet & Tube Co. v. United States, 295 U. S. 476, 479 (1935); Jefferson Island Salt Mining Co. v. United States, 6 F. 2d 315 (N. D. Ohio 1925); Scandrett v. United States, 32 F. Supp. 995 (Ore. 1940), *aff'd* 312 U. S. 661 (1941). *Cf.* Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575, 585 (1941); Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591 (1943); Hale, *Utility Regulation in the Light of the Hope Natural Gas Case*, 44 COL. L. REV. 488, 521 (1944).

[18] According to newspaper accounts of the session of Court at which the opinions were read, Justice

competing standards of the Act. But Justice Jackson does not join issue with the solution of the dilemma which the Commission and the majority of the Court adopted; instead, although he expressly confines himself to the eighth ruling of the majority, he bolsters his argument against the eastern rate increase by the implicit rejection of some of the other points on which that ruling rests. Thus he says that the eastern rate increase was designed to make transportation as expensive in the East as it is in other areas "where there is less traffic to divide the cost." This is an obvious reliance upon the argument that the greater density of traffic in the East results in lower costs for railroad service there—an argument which was rejected in the Edwards report and by the Commission. Of course, one may be unpersuaded by the Edwards report, as were two members of the Commission;[19] but the question is whether that report provided a reasonable basis for the finding of the majority of the Commission. Justice Jackson nowhere says that it did not. Similarly he speaks of taking away from the East "one of the advantages inherent in its density of population." Again, he attributes the Commission's order to "a new theory of 'discrimination,'" saying:

> It has never been thought to be an unlawful discrimination to charge more for a service *which it cost more to render*. . . . But now it is held to be an unlawful discrimination if railroads of the Northeast do not make the same charge as other railroads in the South or West, for a different transportation *under different cost conditions*. [Italics supplied.]

No explanation is given for this repeated refusal to recognize the Commission's findings as to differences in transportation conditions and the Court's ruling that those findings had substantial support in the evidence.

The Government, says Justice Jackson, "frankly advocates this new concept of discrimination as necessary to some redistribution of population in relation to resources that will reshape the nation's social, economic and perhaps its political life more nearly to its heart's desire." This interpretation is apparently based on a statement quoted from the Government's brief which, to many readers, will appear to say just the opposite. It seems reasonably clear, at least, that the Government lawyers did not wish to be understood as advocating any such concept;[20] and the Commission itself specifically disclaimed any such intention.[21]

This decision of the Supreme Court was, as a matter of fact, generally expected. Some of the contributors to this symposium confidently predicted that the Commission's findings would be upheld, and those contributors who express the point of view of the railroads have concentrated their attention on the other branch of the

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Jackson departed from his text to interject that "this majority opinion is on the same theory as when you put a lead on a fast horse to slow it down." N. Y. Times, May 13, 1947, p. 18, col. 5. According to the same account, Justice Frankfurter likened the Commission's solution to "burning down the barn to roast a pig"—an Elianic allusion which does not appear in the official opinion.

[19] Commissioners Porter and Barnard, dissenting, in Class Rate Investigation, 262 I.C.C. 447, 709, 717, 725 (1945).

[20] See Miller, *Corrective Action by the Interstate Commerce Commission, infra*, division II B.

[21] Class Rate Investigation, 262 I.C.C. 447, 692 (1945).

problem—the resort to the antitrust laws by some proponents of rate reform. Here, too, there has been a recent development. The Reed-Bulwinkle Bill,[22] which exempts from the antitrust laws certain agreements entered into by railroads with the approval of the Interstate Commerce Commission, was passed by the Senate on June 18, 1947, after the adoption of an amendment of questionable effect, proposed by Senator Russell of Georgia, providing that the bill should not deprive the Supreme Court of jurisdiction in the case of *Georgia v. Pennsylvania Railroad*,[23] nor change any principle of law applicable in the determination of that case, nor deprive any party to that case of relief to which he would otherwise be entitled, nor render lawful any act found unlawful in that case.[24] No reference was made to the antitrust proceeding by the United States against the western railroads.

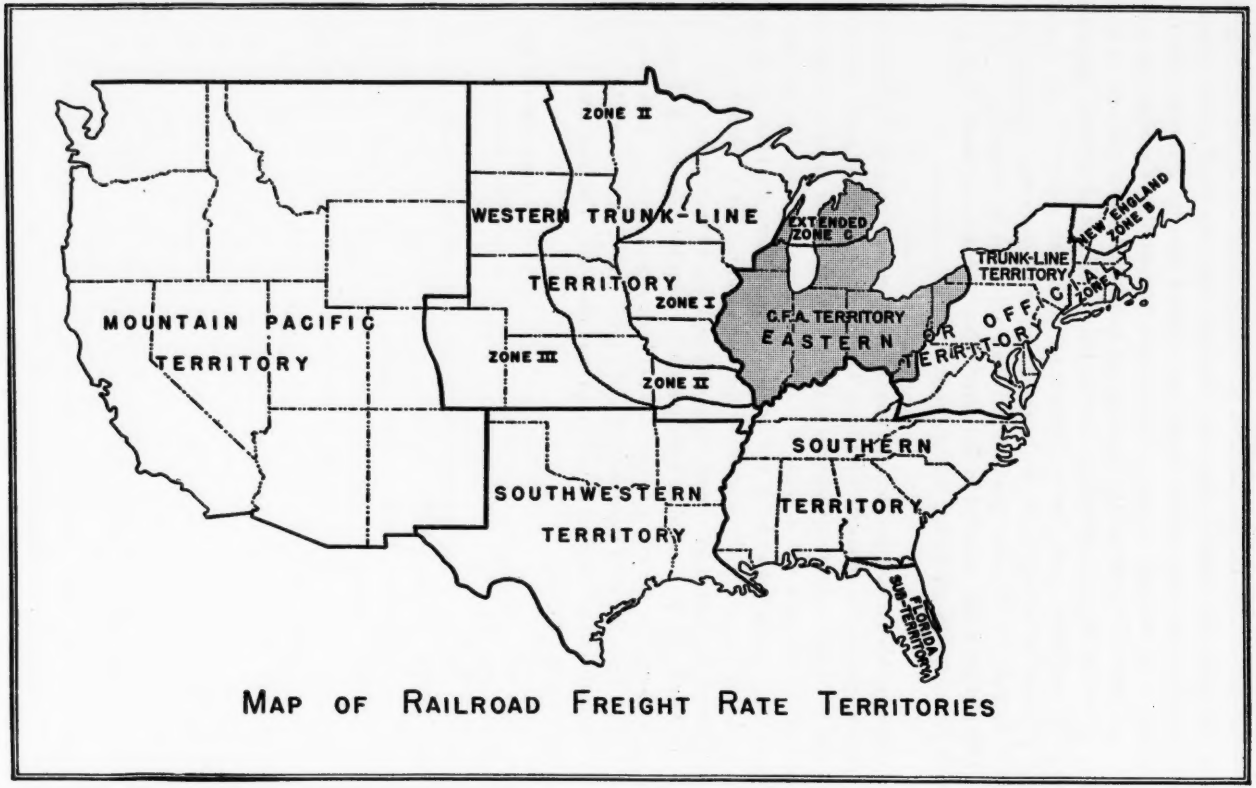
Thus, as this symposium enters the final stages of publication, final legal approval has been given to the Interstate Commerce Commission's approach to the correction of rate inequalities, and the struggle over the attempt to use the antitrust laws as an approach to the same end is about to reach its climax. Whatever the outcome of the antitrust struggle may be, it will be interesting to watch the effect of the new rate relationships on the development of the South and the West. Someone, not an adherent of the cause of rate equalization, once said that he wished the rate demands of the South and West could be fully met without further ado; it would then become apparent that the rate structure had not been a primary factor in the retarded industrial development of those sections, and a great deal of energy could be released for application to the removal of more important obstacles. The conditions for such a test are now imminent.

BRAINERD CURRIE.

[22] S. 110, 80th Cong., 1st Sess. (1947).

[23] *Supra*, note 8.

[24] 93 CONG. REC. 7345-7363 (June 18, 1947). In the Seventy-ninth Congress the House passed the Bulwinkle Bill on December 10, 1946.



MAP OF RAILROAD FREIGHT RATE TERRITORIES

THE RATE STRUCTURE

MILTON S. HEATH*

The transportation rate structure is typical more or less of price structures prevailing generally throughout modern large-scale industries. The dominant characteristics of such price structures are: the existence side by side of many different classes, groups, and sub-groups of prices within the same industry, a complicated pattern of price differentials both between and within such groups of prices, and a considerable rigidity of most of the prices and price relationships. Price behavior in such industries does not conform very closely to the old familiar conceptions of pure competitive determination; competitive forces are primarily monopolistic, oligopolistic, or absent; prices may be said to be "administered," if that term is understood to be used in a very broad sense. Various rules and devices, some of which are quite complicated, are employed as aids in setting prices. It is often asserted that these rules rest upon basic principles; but when such principles are subjected to scrutiny they are found frequently to be vague in meaning, or even self-contradictory. Investigators of these price behaviors have made considerable headway in recent years; yet much remains to be done before a satisfactory understanding of all the complicated price-determining forces is achieved. More data must be collected, and better methods of collecting and sampling data must be devised in many cases. In the field of transportation, though the volume of collected information exceeds, probably, that on any other industry, our knowledge of actual rates is very incomplete.[1]

The transportation rate structure, while resembling the general pattern of modern industrial prices, exhibits important features of its own. These singular characteristics result, in part, from distinctive factors within the industry, and, in part, from public interference.

First, with respect to the nature of the industry itself, it should be noted that the article produced is a service. This service is the moving of commodities and persons. Now the moving of matter is, in the abstract, a rather simple function, and it might appear that such a service could be readily divided into equal, homogeneous units, and so marketed. But actually such is not the case. The railroads transport some twenty-five thousand different articles. Most of this large number are carried in several different forms and unit sizes. Almost every one of these articles possesses

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[1] The Bureau of Transport Economics and Statistics of the Interstate Commerce Commission has set up a continuing program of actual rate studies in all fields of transportation which should supply much of the needed quantitative information.

individual characteristics which in some degree determine the character of the service rendered to it. Distances of haul vary widely, and distance is not a homogeneous factor: longer distances are not simply multiples of shorter ones. Topography strongly influences transportation, and topographical conditions vary greatly. Varying percentages of idle capacity, in different areas and periods of time, affect both the costs and the character of service, as do different scales of physical operations. Forms and degrees of monopoly and competition, both among transportation agencies and among the industries served, vary so widely that generalizations in these respects are likely to possess limited validity. Summary figures of ton-miles of service, therefore, imply a homogeneity which does not exist. The "commodity" of transportation tends to become differentiated by the infinite variety of goods transported and the many different conditions under which the services are rendered. No other industry directly serves so high a proportion of the productive activities of the nation, nor operates under so wide a range of physical, social, and technological conditions. Therefore it can be maintained, with some reason, that the transportation industry actually sells more different commodities than any other industry.

It would be logical to expect, in view of what has been pointed out above about the nature of the industry, that transportation would present the widest variation in prices among large-scale industries. At times this has probably been the case, but it is doubtful whether it is true today. The natural tendency toward a complexity of rates, that is always likely to lead ultimately to utter confusion, has compelled transportation agencies to group and standardize their prices in probably greater degree, relatively speaking, than has been found necessary in most large-scale, inflexible-cost industries. Class rates represent the highest degree of uniformity: most of the twenty-five thousand different commodities have been classified into some seven to twelve classes; rates are charged only upon these classes, and all of the class rates are calculated from some four or five basic rate scales. Though less standardized, the commodity rates seldom apply to single commodities, nor to single distances; rather they usually include large generic groups of commodities, and apply to extensive areas of the United States. Fixed differentials are adopted for both class and commodity rates, whereby a single key rate automatically establishes all rates within the structure: the first-class rate scale supplies the key rate for all of the class rates; and usually a key rate between the chief producing area and the principal market controls the pattern of a commodity rate group. Distance relationships are standardized by area groupings and mileage scales and by standard rules for constructing mileage. Differences of density, scale, and physical conditions of operation are standardized for rate-making purposes into such differentials as single-line, joint-line, and local rates, and scales of arbitraries. Thus a change in a railroad rate usually involves a change in a class, a scale, a commodity group, a general rule, or some other general relationship rather than simply an alteration in a particular rate *per se;* and most major rate changes today involve innumerable shipments and a complexity of relationships that can be dealt with only by standardized patterns of rate making. The

broadest aspects of regularization, to date, probably, are the considerable unification of rate-making patterns and procedures within the three major geographical regions of the United States—North, South, and West—and the observance of certain standard rules and key relationships in fixing rates on interterritorial shipments.

The influence of public regulation has resulted, undoubtedly, in greater simplicity and uniformity of the rate structure than would have been the case had it been lacking. The Interstate Commerce Commission has secured the adoption of standardized rules, procedures, and principles of rate making; it has brought about uniformity in the construction of distance scales and class differentials; it has established the limits—broadly speaking—of various rate levels for both class and commodity rates. In the recent *Class Rate Decision*,[2] the Commission's policy of uniformity has been carried to its greatest lengths. While it is still true that private transportation agencies initiate most rates and rate changes, nevertheless all such actions are taken subject to the limits of policy defined by the Commission.

Studies of the rate structure may have two broad objectives: (a) to ascertain what are the relative rate levels with respect to regions, industries, or types of commodities, and (b) to establish bases for comparisons of the prices of transportation with the prices of other goods or with prices in general. Since inquiry in this symposium is directed to certain aspects of relative rate levels, information presented in this paper will be limited to the first of these two general questions. Any study of relative rates requires some understanding of the mechanics of the rate structure.

TABLE 1

MAJOR RAILROAD CLASSIFICATIONS[a]

Percentage of Class 100	Regular Class Designation			
	Official	Southern	Western	
			Western Trunk-line and Southwestern	Mountain-Pacific
100	1	1	1	1
85	2	2	2	2
70	3	3	3	3
60	–	–	–	4
55	R26	4	4	–
50	4	–	–	5, A
45	–	5	A	–
40	–	6	–	B
37½	–	–	5	–
35	5	7	–	–
32½	–	–	B	–
30	–	8	C	C
27½	6	–	–	–
25	–	9	–	D
22½	–	10	D	–
20	–	11	–	E
17½	–	12	E	–

[a] Reproduced from *Class Rate Investigation, 1939*, 262 I.C.C. 447, 467 (1945).

[2] 262 I. C. C. 447 (1945).

Comparisons of rate levels must take cognizance of differences in the construction of rate scales, rate groups, and differentials.

The mechanics of the rate structure has three basic characteristics: (a) the area within which the published rates apply, (b) the pattern for determining the shipments upon which any given published rate applies, and (c) the formula or pattern by which rates are calculated. These three aspects are indicated in Tables 1, 2, and 3. All of the tables distinguish the three major rate-making territories, and also the

TABLE 2

INTRATERRITORIAL CLASS 1 RATE SCALES (CENTS PER 100 POUNDS)*

Distance in miles	5	50	100	200	300	400	500	600	800	1000	1250	1500
Official.....	33	47	62	80	96	109	122	135	160	182	209	237
Southern.....	37	62	84	112	134	156	173	189	222	249	282	315
Western Trunk-line...	35	53	73	97	117	136	156	176	210	240	277	315
Southwestern..	40	65	90	123	147	172	196	220	263	300	348	394

* 262 I.C.C. 447, 744 (1945) Appendix 8. Certain important sub-zones are omitted. New England sub-zone in official territory and Zone II in western trunk-line territory have scales higher than those of their respective territories shown above. Zone III scale in western trunk-line territory is the same as that of southwestern territory. The southern border area scale is lower than the southern scale up to 200 miles, the same for longer distances up to 400 miles, and then slightly higher up to 620 miles where it ends.

three principal divisions of the very large western territory.[3] Table 3 reveals that territorial rate groupings are of two types, namely: intraterritorial, or rates on shipments within a single territory, of which there are five major groups; and interterritorial, or rates on shipments between territories, of which there are twenty major groups.

Table 3 also shows the second general characteristic of the rate structure: that it is actually divided, in all territories, into three different types of rates. These types are basically two: class rates and commodity rates. Exception rates are allowed departures from the class rates on specified commodity shipments, such departures being effected by transfers from one standard class to another or to a different percentage of the first-class rate, or by some modification of the rules regarding shipments on class rates; they are similar to commodity rates in that they are essentially special rates, but they remain tied to the class-rate structure through the continued employment of the class-rate mechanism. Nearly every article produced in the United States is classified for rate-making purposes in each of the major rate territories, and therefore nominally has a class rate anywhere in the United States; but if any other rate is published it, rather than the class rate, will normally apply on the specified shipment. Such a rate would be known as a commodity rate and would be the actual, or effective, rate. Inspection of Table 3 reveals that a traffic count made in 1942 indicated that 85 per cent, in bulk, of American railway freight traffic moved

[3] Western territory might well be considered to comprise three major territories so far as operating conditions and levels of rates are concerned.

TABLE 3

ALL CARLOAD TRAFFIC TRANSPORTED ON SEPTEMBER 23, 1942[a]

Territory, or Territories	PER CENT OF CARLOADS		
	Class Rates	Exception Rates	Commodity Rates
United States	4.1	10.7	85.2
Intraterritorial:			
Official, or eastern	5.8	17.6	76.7
Southern	1.8	6.0	92.2
Western trunk-line	.6	.2	99.2
Southwestern	2.4	4.4	93.2
Mountain-Pacific	1.7	.0[b]	99.7
Interterritorial:			
Official to southern	12.6	36.3	51.1
Official to western trunk-line	12.3	35.4	52.3
Official to Southwestern	22.5	52.0	25.5
Official to mountain-Pacific	11.3	.0[b]	88.7
Southern to official	.9	4.9	94.2
Southern to western trunk-line	1.5	13.5	85.0
Southern to southwestern	6.1	22.1	71.8
Southern to mountain-Pacific	4.1	4.9	91.0
Western trunk-line to official	3.1	1.0	95.9
Western trunk-line to southern	6.1	3.1	90.8
Western trunk-line to southwestern	13.0	6.2	80.8
Western trunk-line to mountain-Pacific	2.6	.0	97.4
Southwestern to official	1.5	3.4	95.9
Southwestern to southern	1.2	4.3	94.5
Southwestern to western trunk-line	2.0	3.0	95.0
Southwestern to mountain-Pacific	3.9	.0	96.1
Mountain-Pacific to official	0.7	.0	99.3
Mountain-Pacific to southern	1.5	.0	98.5
Mountain-Pacific to western trunk-line	0.7	.0	99.3
Mountain-Pacific to southwestern	2.1	.0	97.1

[a] 262 I.C.C. 479, 564 (1945). The data were collected and analyzed, and the above percentages were computed, by the Commission's Bureau of Transport Economics and Statistics with the aid of its Bureau of Traffic. Railroad waybills constituted the primary source of the data.
[b] Less than 0.05 per cent.

on commodity rates, and that class rates with few exceptions moved insignificant amounts of the traffic outside of official territory and shipments outbound from official territory. It should be pointed out also that the territorial divisions discussed in the preceding paragraph refer mainly to the class-rate structure. Commodity rates are usually built up into separate group patterns formed around generic groups of products. The same group may have separate rate structures for different geographic areas and transportation routes. Raw materials which are locally produced and processed, and therefore are moved for short distances only, may have many different commodity-rate structures in each of the major class-rate territories; on the other hand, California citrus fruit and West Coast lumber have commodity-rate structures embracing the entire United States, which ignore major class-rate territories almost entirely. Though many of the influences which have resulted in the differentiated

territorial structure of class rates have also operated in the construction of commodity rates, by and large each commodity-rate structure evolves its own effective rate territory, and there is no over-all uniformity whatsoever of commodity-rate territories.

An extended discussion of the third aspect of the rate structure—the technical construction of rates—would not serve the main purpose of this discussion. Tables 1 and 2 afford some general idea of how present intraterritorial class rates are constructed. Table 1 indicates the number of classes in each territory and how they are symbolized; Table 2 presents a skeleton of the class 1 mileage scales which are used in the various regions; and the left-hand column of Table 1 indicates the percentage intervals that are used in determining the rates of all of the classes from the class 1 scale. Interterritorial rate mechanisms are similar in general to the intraterritorial ones, though the problems of classification require a variety of special rules, and the mileage scales are based on somewhat different principles. The Interstate Commerce Commission, in a long series of class rate investigations since World War I, has brought about the universal use of distance scales for class rates, and has greatly reduced the differences between them; nevertheless, they still vary rather widely as to contour and level of rates. In the recent general *Class Rate Investigation* the Commission prescribed a uniform classification for the entire United States and a single maximum mileage scale for all of the United States except mountain-Pacific territory.

Many different patterns are used in constructing commodity rates. The simplest, probably, are individual point-to-point rates. Some use is made of individual mileage scales; if such scales are employed for a fairly complex group, differentials may be used, so that the resulting group rate structure may resemble somewhat a class-rate structure limited to one type of commodity. Territorial first-class rate scales have even been adopted as a basis for constructing some commodity rates; this is particularly true in the South, where they have become known as column rates, since they use some percentage of the class 1 rate. Proportional rates are a common device where interterritorial shipments are involved. Basic key rates play the dominant role in the establishment of most long-distance commodity rates. Taken as a whole, especially for longer hauls, the predominant type of commodity rate is the group rate.

Coming now to the fundamental problem of relative rate levels, several perplexing questions first arise as to the significance and treatment of data. Price levels are commonly represented as percentages of some base group of prices; and they are calculated usually from actual prices which in turn are weighted by the amounts of goods exchanged at such prices within a given time period. Rate levels, on the other hand, have seldom been computed in this fashion; they have been computed from the *published* rates, rather than from actual rates charged upon shipments. Consequently, a rate upon which nothing has moved has exercised the same weight as one upon which goods have been shipped. The published rates which have been used almost invariably have been the class rates, upon which less than 5 per cent of the traffic moves; while commodity rates, which move 85 per cent, have been

omitted. Actual rates are very difficult to determine except by extensive waybill studies. Even then the calculation of actual revenue rate levels would require many adjustments for differences in services, conditions, and consists of traffic among the various territories.

Rates within official territory are generally used as the base, or 100 per cent level, for comparisons of rate levels among the various territories. Various levels of published rates—primarily those in which the southern states are concerned—are indicated in Tables 4 to 8, inclusive.[4] These are typical of relative levels in general.

TABLE 4

INTRATERRITORIAL CLASS 1 RATE SCALES AS PERCENTAGES OF OFFICIAL TERRITORY SCALE

Distance in miles	50	100	200	300	400	500	600	800	1000	1250	1500	Average
Official	100	100	100	100	100	100	100	100	100	100	100	100
Southern	121	127	140	140	143	142	140	139	137	135	133	136
Western trunk-line	113	118	121	122	125	128	130	131	132	134	133	126
Southwestern	138	145	154	153	159	161	163	164	165	166	166	158

TABLE 5

INTERTERRITORIAL CLASS RATES BETWEEN EASTERN AND SOUTHERN CITIES EXPRESSED AS PERCENTAGES OF THE EASTERN CLASS RATE SCALE FOR EQUIVALENT DISTANCES

	Atlanta, Ga.	Charleston, S. C.	Jackson, Miss.	Jacksonville, Fla.	Johnson City, Tenn.	Memphis, Tenn.	Miami, Fla.	Montgomery, Ala.	Nashville, Tenn.	New Orleans, La.	Raleigh, N. C.	City Average
Baltimore, Md.	132	130	133	127	103	131	136	131	137	130	115	128
Bangor, Me.	114	110	115	112	106	116	122	115	121	114	112	114
Boston, Mass.	118	115	120	117	103	120	125	119	123	118	108	117
Charleston, W. Va.	143	139	141	138	109	133	148	140	141	137	116	135
Chicago, Ill.	137	138	135	138	117	128	145	135	133	136	113	132
Dayton, O.	143	139	135	142	123	128	149	141	138	140	114	136
Detroit, Mich.	139	133	133	138	114	125	148	138	132	136	113	132
Montpelier, Vt.	121	115	122	118	107	129	127	121	134	120	111	120
New York, N. Y.	126	122	128	123	104	125	131	127	130	125	113	123
Pittsburgh, Pa.	146	128	135	129	112	125	138	140	132	138	113	130
Richmond, Va.	143	143	135	132	102	135	149	136	144	136	127	135
St. Louis, Mo.	140	140	143	143	126	141	149	143	138	140	112	138
Syracuse, N. Y.	125	122	129	123	105	125	132	128	125	127	111	123
Terre Haute, Ind.	143	142	141	140	124	135	148	141	140	138	110	137
City Averages	133	129	132	130	111	128	139	132	133	131	113	
Total Average	...	...	...	...	...	...	...	...	...	...	...	128

[4] Tables 4-8 are reproduced by permission of the *Southern Economic Journal* from the author's article, *The Uniform Class Rate Decision and Its Implications for Southern Economic Development*, 12 SOU. ECON. JOUR. 213 (1946).

Table 4 presents a comparison of the levels of the four major intraterritorial class 1 rate scales for various specified distances. The averages in the right-hand column are computed simply from the individual percentages in the table. Averages will vary slightly depending on the number and selection of points on the scales. If all points are included, the southern average would be 137.7 per cent of the official scale.[5] It should be noted that the levels within each territory vary considerably for different segments of their respective scales.

Tables 5 and 6 present similar comparisons of interterritorial class rates with rates for similar distances of the official intraterritorial class-rate scale. In calculating relative levels in these instances the interterritorial class rates and distances selected are those applying between representative major cities in the four territories. Inspection of the tables reveals that relative class-rate levels for particular distances vary much more widely in the case of interterritorial than in that of intraterritorial class rates. Variations in rates between southern- and official-territory cities range from the Raleigh-Boston rate, which is 3 per cent above official, to the Miami-Richmond and Miami-St. Louis rates, which are 49 per cent higher; the extremes are even wider in the case of southern-western interregional class rates. The variations are not uniform for like distances as in the case of the intraterritorial scales. The interterritorial class-rate scales have been constructed primarily upon a pattern of key rates between principal cities; these key rates reflect long-established competitive ad-

TABLE 6

INTERTERRITORIAL CLASS RATES BETWEEN SOUTHERN AND WESTERN CITIES EXPRESSED AS PERCENTAGES OF THE EASTERN CLASS RATE SCALE FOR EQUIVALENT DISTANCES

	Atlanta, Ga.	Charleston, S. C.	Jackson, Miss.	Jacksonville, Fla.	Johnson City, Tenn.	Miami, Fla.	Montgomery, Ala.	Nashville, Tenn.	Raleigh, N. C.	City Averages	Total Average
Western trunk-line:											
Cedar Rapids, Ia. .	139	144	139	144	126	150	139	129	125	137	
Denver, Colo.....	158	158	164	161	150	168	160	152	144	157	
Green Bay, Wis. . .	138	139	135	141	127	149	134	127	117	135	
Kansas City, Mo..	140	144	157	148	139	160	147	136	128	143	
Minneapolis, Minn.	140	141	140	143	134	153	141	132	129	139	
Wichita, Kan.....	158	157	162	155	145	168	160	150	137	155	
City Averages..	145	147	150	149	137	158	147	137	130		144
Southwestern:											
Dallas, Tex.....	160	158	161	159	163	165	161	162	157	161	
Houston, Tex.....	157	156	157	155	159	166	157	160	156	158	
Little Rock, Ark...	153	153	153	155	158	161	151	148	151	154	
Okla. City, Okla...	156	157	161	158	159	165	159	155	147	157	
San Antonio, Tex..	160	159	158	159	160	168	159	162	160	161	
Shreveport, La....	155	156	151	154	159	163	154	157	156	156	
City Averages..	157	156	157	157	160	165	157	157	154		158

[5] 262 I. C. C. 447, 592 (1945).

justments between producing and marketing centers and between alternative transportation routes, including water-competitive services.

Tables 7 and 8 attempt to present a comparison of the levels of southern and official commodity rates. The territorial groups compared are similar to the class-rate groups: first, Table 7 compares southern intraterritorial commodity rates with official intraterritorial commodity rates, and then Table 8 provides a comparison of

TABLE 7

RELATIVE LEVELS OF SOUTHERN INTRATERRITORIAL COMMODITY RATES[a]

Southern Commodities	Per cent of Official Commodity Rate Level
Brick	75-80 per cent of trunk-line; 90 per cent of central freight territory.
Coke	100 per cent; Alabama intrastate scale is lower.
Iron ore	Alabama intrastate scale is 79 per cent of official territory.
Iron and steel scrap	50,000 minimum: lower on 70-480 mile hauls, higher on others; 80,000 minimum: substantially lower on most hauls, 40-1,000 miles.
Pig iron	72 per cent.
Fertilizer and fertilizer materials	100 miles:[b] 48 per cent, 56 per cent; 200 miles: 65 per cent, 73 per cent; 300 miles: 93 per cent, 101 per cent.
Lime	100 miles:[b] 96 per cent, 102 per cent; 380 miles: 90 per cent, 99 per cent; 700 miles: 86 per cent, 97 per cent.
Logs	Considerable part of South: 100 per cent; elsewhere: 68-88 per cent.
Lumber	50 miles: 64 per cent; 100 miles: 68 per cent; 200 miles: 80 per cent; 300 miles: 86 per cent; 400 miles: 96 per cent; 600 miles and over: 100 per cent.
Pulpwood	200 miles: 57 per cent; 660 miles: 66 per cent.
Sand, gravel, crushed stone, and slag	There are 3 scales in official territory. Southern scale is lower than 2 of them; is same as third for some distances, lower for others.
Sulphuric acid	70-75 per cent.

[a] 262 I.C.C., 447, 593-600 (1945).
[b] The first percentage figure for each distance refers to the trunk-line scale; the second refers to central freight territory scale.

southern interterritorial commodity rates with official intraterritorial rates on the same commodities. Adequate data are not available for the computation of any general commodity rate level. Even if data were readily available, the task would be a very difficult one. Individual commodity rate structures are innumerable and of very many different types. There may be several different ones for the same commodity in a single territory. Dissimilarities of service and consist are legion. These factors of difference are one of the chief justifications for commodity rates. No attempt, therefore, is made here to calculate or estimate general commodity rate levels. The tables present solely comparisons of individual scales and groups of commodity rates. Table 7 shows that rates for the principal raw materials and capital goods utilized in industry, construction, and agriculture average rather considerably lower on shipments within the South than in official territory. On articles shipped out of the South, Table 8 exhibits a wide range of commodity rate levels, with cigarettes, for example, paying 77 per cent of northern rates and steel bars and sheets

TABLE 8

RELATIVE LEVELS OF SOUTHERN INTERTERRITORIAL COMMODITY RATES*

Commodities Shipped Between Southern and Official Territories	Per cent of Official Territory Rates on Same Commodity
Aluminum sheet and plate	92 per cent
Automobile tires	Some are lower; others are same
Bauxite	94 per cent
Boots and shoes	90 " "
Canning supplies: alum, turmeric, glass bottles and jars, metal covers, tops, and caps—to Faison, N. C.	68.3-91.5 per cent
Cigarettes	77 per cent
Cigarette paper, L. C. L.	90 " "
Smoking and chewing tobacco	97 " "
Shelled peanuts	95 " "
Bricks and clay products; distilled liquors; foundry products; hosiery; tanners' glue; stone, marble, and slate; lime; coke; sugar; coal and wood stoves, furnaces, heaters; gas stoves, furnaces, heaters; castiron pipe fittings, L. C. L.; iron body valves; brass pipe fittings; brass cocks and valves; soapstone and talc; enamelled iron and steel plumbers' goods; papeteries; ferromanganese; ferroalloys; unfinished aluminum, blanks, stampings, and shapes; asphalt, petroleum, coke; leather; pig-iron; aluminum pig or ingot; cast-iron pipe; cast-iron hardware; hydrants and fire plugs; upholstering fabric and trimming; cotton flannels or napped fabric; wooden automobile-body parts	100 per cent
Livestock	100-101 per cent
Green salted hides	101-106 " "
Unmanufactured tobacco	106 " "
Cottonseed	107 " "
Finished cotton piece goods	108-109 " "
Wood pulp, paperboard, paper boxes, pulpboard, paper bags and other paper articles	110 " "
Clay	112 " "
Hides	127 " "
Steel bars and sheets	129 " "
Cooking and salad oil	137 " "
China plumbers' goods	139 " "
Chinaware pottery; tractors	140 " "
Mechanic tools	151 " "
Asphalt paint	153 " "
Newsprint	159 " "

* Class Rate Investigation, 1939, 262 I.C.C. 447, 601-604 (1945). The large number in the 100 per cent group results in the main from a considerable group of commodity rate cases recently decided by the Commission: American Distilling Co. v. Akron, C. & Y. Ry., 140 I.C.C. 633 (1928); Krupp Foundry Co. v. Southern Ry., 148 I.C.C. 743 (1928); Hosiery from Southern Points, 156 I.C.C. 117 (1929); Stone, Marble, and Slate from or to Southern Points, 183 I.C.C. 611 (1932); Muscle Shoals White Lime Co. v. Akron & B.B. R.R., 205 I.C.C. 273 (1934); Franzell v. Louisville & N. R.R., 215 I.C.C. 281 (1936); Sugar from Gulf Coast Port Groups to Northern Points, 234 I.C.C. 247 (1939); State of Alabama v. New York Central R.R., 235 I.C.C. 255 (1939); Alabama By-Products Corp. v. Ahnapee & W. Ry., 256 I.C.C. 649 (1943).

paying 129 per cent of corresponding northern rates. Both are leading products of southern industry. Outbound rates on most of the principal southern manufactured products range between 90 and 110 per cent of corresponding northern rates.[6] The

[6] It should be pointed out that relatively higher outbound rates on such raw materials as unmanufactured tobacco, clay, and hides favor southern industry; and this is especially so when, as in these cases, the outbound rates on products manufactured from such raw materials are the same as or lower than northern rates.

evidence of the tables indicates that the general average of southern commodity rates differs only slightly from that for official territory.[7] The range of southern rates, however, is much wider; and so any "average" level of rates is not as representative as a corresponding average for official-territory rates.[8]

Can any estimates be made of relative levels which would include all types of published rates? The answer is doubtful. Any such calculation would probably be meaningless. The research bureau of the Interstate Commerce Commission has calculated the relative revenue levels of all rates for southern and official territories. These revenue levels are based on actual rates paid on total shipments in terms of revenue yields per ton-mile. These computations, adjusted for certain differences between territories, indicate that the level of all rates—class, exception, and commodity—actually paid on southern traffic ranges from 3 to 5 per cent above corresponding levels in official territory.[9]

The foregoing discussion is based upon the rate structure as it existed at the time of the *Class Rate Investigation*. Presumably it has remained substantially unchanged up to the present time. Any rate changes that have taken place have been general and have not affected the relative rate levels. The decision of the Commission in the *Class Rate Investigation,* announced in 1945, prescribed a policy of uniform class rates except for mountain-Pacific territory. Such a policy will require some years to put into effect. However, the Commission included an interim decision which required an increase of 10 per cent in official intraterritorial class rates and a decrease of 10 per cent in all others, to take effect on August 30, 1945. A subsequent petition in the federal courts by nine eastern states to have the decision set aside on the grounds of unreasonableness has just been decided by the Supreme Court.[10] While this litigation was pending the Commission's order was suspended; consequently no part of the decision has been put into effect as this is written.

[7] This conclusion appears to be corroborated by calculations of the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission as to relative freight revenue levels. 262 I. C. C. 447, 604-607 (1945).

[8] This is likewise true for comparisons of class-rate levels. The range of the southern class-rate structure is much wider than that of official territory.

[9] 262 I. C. C. 447, 604-607 (1945).

[10] See the FOREWORD to this symposium.

THE HISTORICAL DEVELOPMENT OF EASTERN-SOUTHERN FREIGHT RATE RELATIONSHIPS

DAVID M. POTTER*

I

INTRODUCTION

For at least the past decade, the railway freight-rate question has been recognized as one of the major issues in the adjustment of the South to the national economy. As such it has been much discussed, but even the facts of the question are still rarely understood, and the historical origin of regional differentials has been almost wholly neglected.

Such neglect finds its explanation, at least in part, in the fact that few American institutions, economic or other, rival the freight-rate structure in complexity. In quantitative terms, this complexity takes the form of an accumulation of separate rates estimated at ten million pages on file with the Interstate Commerce Commission. In analytical terms, it takes the form of a situation in which factors and conditions are so intricate that few generalities can be stated without extended qualification, and few conclusions can be reached without putting the data through a sequence of processes.

There is no basic uniformity in rates, either according to the mileage traveled or according to the weight or bulk of the load carried. *A priori,* one might expect such uniformity, but the fact is that not even the severest critics of the existing system demand it, for it is recognized that goods must travel at a rate that will permit them to go to market, and uniformity does not allow this. For instance, California oranges must go to New York at a rate which will enable them to share the market with Florida oranges which have travelled less than one-third as far, and coal, valued by the ton, must move at a rate which it can pay, quite as much as quinine, valued by the ounce. One railroad official has said, "A rate is nothing more or less than an effort to comply with the necessities of commerce. A rate is no good if it is not moving traffic. You have got to make rates based on what the conditions are, and you cannot use a formula."[1] He might have added that the entire body of freight rates is not merely one containing differentials—regional and other—but that it con-

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[1] Testimony of A. F. Cleveland, in *Hearings before Committee on Interstate Commerce on S. 942,* 78th Cong., 1st Sess. 1059 (1943). Mr. Cleveland might have added that a rate is sometimes a device for determining what traffic shall move, and to what destinations.

sists essentially of an immeasurable mass of carefully adjusted differentials, in which fairness should always be an objective, but in which uniformity cannot be. In such an intricate system no safe generalization can be derived from any individual rate, and no individual rate can be understood without a recognition of a number of basic features of the structure.

One of these basic features is the system of classification. Different commodities, obviously, may be conveniently grouped or classed together according to their similarity in bulk, value, or the like. Accordingly, a range of categories or classes is set up, and almost every conceivable article eligible for transport is classified in one or another of these categories. If the same classifications applied throughout the country one could analyze the question of rates purely in terms of the tariffs which applied to each class; but in fact there are, regionally, three separate classification areas—southern, western, and eastern or official—and articles which fall into the highest class in one of these territories may be assigned to a quite different class in another. Thus, of the 10,305 types of articles which are classified in both official and southern territory, at carload rates, only 4,934 are placed in class groups which correspond to one another (and, as will appear, the fact that they correspond does not mean that they will pay the same rate), while 1,344 are placed in a lower bracket in the South and 4,027 are in a lower bracket in the East.[2]

Classification, however, does not determine the tariff. It determines only what relation an article will bear to other articles in the payment of tariff, and, if it is not first class, what percentage of the first-class rate it will pay. The actual determination of tariffs or rates is quite separate, and where there are only three classification territories in the United States, there are five major rate territories. East of the Mississippi, these include the eastern or official territory, extending south roughly to the Ohio and into southern Virginia, and the southern territory, embracing all that does not fall within official territory. West of the Mississippi, the trunk-line, southwestern, and mountain-Pacific territories divide the field. The rate structures vary substantially among these territories, and until very recently the Interstate Commerce Commission has treated them as separate entities, with considerations applying to one territory not necessarily operative in another.

The interdependence of classification and rate making lays pitfalls for the analyst. Thus, an article in the South may pay a higher charge than the same article in the East either because it is in a higher class than the eastern article or because, although in an equivalent class (both first class, for instance), the rates for the two classes show a disparity. The freight charge may be raised or lowered on an article, without changing rates, by moving it from one class to another, or without changing the class, by altering the rate for that class. This provides complexity enough within a territory, but when an article crosses the Ohio or traverses the state of Virginia, it

[2] BOARD OF INVESTIGATION AND RESEARCH, REPORT ON INTERTERRITORIAL FREIGHT RATES, H. R. DOC. No. 303, 78th Cong., 1st Sess. 25 (1943).

moves into both a different classification and a different rate territory. The inter-territorial complexities which result are not to be resolved by any simple process.

As if the intricacies of classification, of rate making, and of dissimilar territorial areas for each did not impart sufficient complexity to the subject, a third basic feature which must be recognized is that the bulk of America's railway freight traffic does not move on class rates at all, but on what are called commodity rates.[3] Many types of products could not compete successfully in the market if they moved on class rates, and therefore certain specific commodities, especially when they represent a substantial traffic, often receive a special rate from one specific point to another, in one direction. These are commodity rates, and though sometimes bearing a loose relationship to class rates,[4] they are wholly diverse, subject to no formula, governable by no generalizations, and susceptible to evaluation only one by one.

Where such intricacies exist, it becomes a major problem of analysis and research to demonstrate to what extent the rates of one territory are higher than another. This question has been treated elsewhere in this symposium and has received elaborate analysis in previous studies.[5] No necessity requires that it be reexamined here. But in order to avoid discussing the historical origins of a situation without indicating what that situation is, it may be well to summarize the nature of the regional differentials. To begin with, it readily appears that first-class goods in southern territory pay a higher rate than first-class goods in official territory. This difference is shown in cents per mile per hundred pounds in a ratio of 79 cents to 62 cents for 100 miles; $1.12 to 80 cents for 200; $1.73 to $1.22 for 500; and $2.49 to $1.82 for 1,000.[6] Of course most articles which take class rates do not take first class, but elaborate computations have shown that the average relationship of all class rates to first class is about the same in southern and in official territories.[7] Therefore the

[3] An analysis of all railway traffic throughout the United States, made on September 23, 1942, showed that, excluding less-than-carload lots (which were only 1.65% of the tonnage), 14.8% of the carloads originating on that day moved on class rates and 85.2% on commodity rates. The class traffic, however, contributed 22.4% of the revenue, and commodity traffic 77.6%. *Id.* at 2.

[4] Authorities agree as to the existence of some correlation between class rates and commodity rates, but disagree vigorously as to the degree of relationship. See, *e.g.*, *Hearings before Subcommittee of the Committee on Interstate Commerce on S. Res. 99*, 76th Cong., 1st Sess. 182-292 (1939). Material on pp. 182, 186, 221, 223, 244, and 255 illustrates the tendency to link class and commodity rates, while material on pp. 185 and 292 emphasizes their separateness. C. E. Widell, General Traffic Manager, Tennessee Products Corp., declared (at 378), "We have an uneven rate structure in the South, and from the South to the North. . . . It has always been uneven. There has, however, grown up in a fairly uniform, reasonable development . . . a commodity rate structure in the South that is most vital to the South. It applies on lumber and logs, brick, sand and gravel, pig-iron, coal and coke, and pulpwood, taking in practically what we call our basic commodities. . . . It is undoubtedly as low as a similar basic commodity rate structure in the North."

[5] The principal authorities are: J. HADEN ALLDREDGE, THE INTERTERRITORIAL FREIGHT RATE PROBLEM OF THE UNITED STATES, published as H. R. Doc. No. 264, 75th Cong., 1st Sess. (1937); ALLDREDGE, SUPPLEMENTAL PHASES OF THE INTERTERRITORIAL FREIGHT RATE PROBLEM OF THE UNITED STATES, published as H. R. Doc. No. 271, 76th Cong., 1st Sess. (1939); and BOARD OF INVESTIGATION AND RESEARCH, REPORT ON INTERTERRITORIAL FREIGHT RATES, H. R. Doc. No. 303, 78th Cong., 1st Sess. (1943).

[6] BOARD OF INVESTIGATION AND RESEARCH, REPORT ON INTERTERRITORIAL FREIGHT RATES, cited *supra*, note 5, at 18-19. It should be observed, however, that despite the higher rate level in the South, the average freight revenue per ton-mile for the first-class railroads in the East in 1941 was 9.89 cents; in the South, 9.46 cents. This was because the lower grade of freight offset the higher rates. *Id.* at 152.

[7] *Id.* at 25-27; see also ALLDREDGE, INTERTERRITORIAL FREIGHT RATE PROBLEM OF THE UNITED STATES, cited *supra*, note 5, at 11-12.

first-class differentials may be regarded as applicable for the entire class-rate structure. On this basis, investigators have concluded that southern class rates are 39 per cent higher than class rates in official territory.

These figures are impressive, but what of the commodity rates, with their great significance in moving the major part of the traffic? For this type of rate no general scale applies, and conclusions must be based upon an accumulation of comparisons for individual commodities. Investigators who have made such item-by-item comparisons conclude that the advantage consistently lies with manufacturers and producers who ship within official territory and that "on most of the commodities there are substantial regional differences in the levels, with higher rates in the South and West than in Eastern territory. In most instances, but not in all, the relative differences in rate levels are less than the differences in the levels of first-class rates in the same territories."[8] Most significant, perhaps, is the conclusion that where the South enjoys favorable commodity rates these have usually applied to agricultural products and raw materials, rather than to manufactured goods.

In the movement between territories, also, there are differentials, both on class and commodity rates, adverse to the South. At one time, it was the practice to construct these interterritorial rates simply by adding the established rate for that part of the haul which lay within southern territory to the established rate for the part which lay within official. But this had the effect of charging for two short hauls rather than one long one, and since the short haul always costs more in proportion to the distance the result was usually a higher rate for the interterritorial haul than either territory would have charged for an internal haul of the same distance. This was palpably unfair, and the practice has now been eliminated. The more normal condition, in recent years, has been that the interterritorial haul would take a rate intermediate between the rates for hauls of similar distances in the two territories involved. At first glance this splitting of the difference seems entirely reasonable, but it is actually at this very point that the differential really operates to cause sectional advantages, for the northern shipper sending goods, say five hundred miles, to a point within southern territory does so at an advantage over the southern shipper who ships for the same distance to the same point. In contrast, the southern shipper, sending goods five hundred miles to a point within official territory, does so at a disadvantage in competition with the northern shipper who ships for the same distance to the same point. Since the great market of the nation is the eastern market, the differential borne by southern manufacturers seeking access to this

[8] Quotation from BOARD OF INVESTIGATION AND RESEARCH, REPORT ON INTERTERRITORIAL FREIGHT RATES, 148. Conclusion based on analysis of seventeen groups of goods taking commodity rates. *Id.* at 92-150, 185-222. THE INTERTERRITORIAL FREIGHT RATE PROBLEM OF THE UNITED STATES, at 27-32, and SUPPLEMENTAL PHASES OF THE INTERTERRITORIAL FREIGHT RATE PROBLEM, cited *supra*, note 5, at 15-18, 41-48 contain extensive comparative data on commodity rates. See also data in *Hearings before Committee on Interstate Commerce on S. 942*, 78th Cong., 1st Sess. 137, 141, 238 (1943), and testimony of A. J. Ribe, of Birmingham, Ala., *id.* at 323: "Except textiles and cast-iron pipe, I know of no manufactured commodity in which the South excels the North [as to commodity rates]."

market has been aptly compared to a protective tariff operating in the interest of eastern industry.

Accepting the findings that these differentials exist, without attempting to determine whether the degree and importance of their disadvantage may have been overstated, it is the purpose of this paper to inquire into three questions: First, it will seek to show how distinctive economic features in the South caused the evolution of a regional rate structure sharply differentiated from that of the East. Secondly, it will deal with the process by which the differentials which grew up through the action of individual railroads were collectivized and institutionalized, as it were, directly by the group action of railroads, and indirectly by the Interstate Commerce Commission. Finally, it will consider the extent to which interest groups have sought to perpetuate the institutionalized rate structure as a bulwark of sectional advantage for industry in the East.

II

ECONOMIC EVOLUTION OF SOUTHERN RATE DIFFERENTIALS

From the day that the Charleston & Hamburg Railroad made its first run, in November, 1832, southern railroads have faced a number of fairly constant economic conditions which inevitably shaped their rate policy and rate structure along distinctive sectional lines.

One of the most basic of these factors was the low density of population. In population per square mile the South has always remained a half century or more behind the New England and Middle Atlantic states, and this has meant for the railroads that they must maintain a greater ratio of track in proportion to the number of people served, or, to express it in another way, that they could not distribute the cost of operation per mile over as large a number of shippers. In recent years a very thorough study has indicated that this population factor is no longer an economic handicap to the South, largely because eastern railroads find the advantage of population density offset by the disadvantage of high terminal costs in the great urban centers,[9] but historically there seems little doubt that the thinly settled character of the southern country was detrimental to the prosperity of the southern roads. This must have been especially true when the population was less than half as great as today, and it was recognized by the United State Industrial Commission in 1902 as a primary cause of higher rates.[10] The full extent of this disparity in density of settlement can be shown only by a statistical comparison, and for this purpose the states now in official territory are compared, in Table 1, with those now in southern or southwestern. From this it will appear that, while the density of southern population greatly increased from 1850 to 1900, and again from 1900 to 1940, it remained less than half of that in the East.

A second basic feature of the southern economy was the fact that the principal

[9] The most recent and exhaustive analysis is FORD K. EDWARDS, RAIL FREIGHT SERVICE COSTS IN THE VARIOUS RATE TERRITORIES OF THE UNITED STATES, SEN. DOC. No. 63, 78th Cong., 1st Sess. 8 (1943).

[10] 19 REP. U. S. INDUSTRIAL COMMISSION 374 (1902).

TABLE 1[11]

POPULATION PER SQUARE MILE FOR STATES NOW IN OFFICIAL TERRITORY AND THOSE NOW IN SOUTHERN OR SOUTHWESTERN TERRITORY, IN 1850, 1900, AND 1940

OFFICIAL				SOUTHERN AND SOUTHWESTERN			
	1850	1900	1940		1850	1900	1940
Maine	16.66	23.2	27.3	North Carolina	19.10	38.9	72.7
New Hampshire	39.60	45.6	54.5	South Carolina	23.87	44.0	62.1
Vermont	39.26	37.7	38.7	Georgia	15.62	37.7	53.4
Massachusetts	137.17	349.0	545.9	Florida	1.48	9.6	35.0
Rhode Island	122.95	401.6	674.2	Alabama	15.21	35.7	55.5
Connecticut	78.06	188.5	348.9	Mississippi	12.86	33.5	46.1
New York	67.33	152.5	281.2	Kentucky	26.07	53.4	70.9
New Jersey	71.46	250.7	553.1	Tennessee	22.79	48.5	69.5
Pennsylvania	49.19	140.6	219.8	Arkansas	4.02	25.0	39.0
Maryland	53.00	119.5	184.2	Louisiana	12.52	30.4	52.3
Ohio	49.55	102.1	168.0	Texas	0.65	11.6	24.3
Indiana	29.24	70.1	94.7				
Illinois	15.37	86.1	141.2				

products, and therefore the principal outbound shipments, were agricultural staples, of which cotton was foremost. From the standpoint of railroad transport, this concentration upon the staples had a number of implications. Since these goods, as raw materials, could not be moved except at rather low rates, it meant that the railroads had to haul them on a small, or even negligible, margin of profit, and compensate themselves by unusually high rates on higher-grade goods. In other words, in the distribution of the rates the incidence of a low rate on this large segment of the traffic meant a disproportionately high rate on other freight. In 1876 the president of the Louisville & Nashville testified that the cost to his company of transportation was 1.23 cents per ton per mile, and that the average charge on freight moving north was also 1.23 cents per ton per mile, which meant no profits, but that the charges on southbound freight averaged 1.87 cents.[12] Furthermore, since the principal products were crops, the movement was highly seasonal, and the railroads found it necessary to secure most of their annual earnings in the four months between September and January.[13] And as compared with industrial enterprise, which requires raw materials and produces goods in a constant flow, agriculture provides an astonishingly light traffic, for it requires no raw materials and produces goods only once a year. The contrast was strikingly illustrated in 1899 by a railroad president who said:

To show the difference in the density of traffic south of the Potomac and north, take Mr. Carnegie's concern at Pittsburgh; they produce a tonnage in and out that is about

[11] Table compiled from U. S. CENSUS OFFICE, THE SEVENTH CENSUS OF THE UNITED STATES: 1850, vol. 1, xxxiii (1853), and U. S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1943, 6 (1944). The corresponding figures for Virginia, partly southern, partly official, were 23.17, 46.1, and 67.1.

[12] Testimony of Albert Fink, President of the Louisville & Nashville, in U. S. BUREAU OF STATISTICS, FIRST ANNUAL REPORT ON THE INTERNAL COMMERCE OF THE UNITED STATES, Appendix, 8, 27, 28 (1876).

[13] WILLIAM Z. RIPLEY, RAILROADS: RATES AND REGULATION 381 (1912).

4½ times the tonnage of the entire cotton crop of the United States; under the control of one man. This, of course, is not in value, but it is the tons moved, from the railroads' standpoint. I can show you little towns in Western Pennsylvania of 10,000 inhabitants that will produce a tonnage equal to the wheat tonnage of such roads as the Great Northern.[14]

Somewhat related to the agricultural nature of the traffic were certain factors affecting the distance and direction of traffic movements. Most of the early southern railroads were built by or at the stimulus of coastal or river ports which wished to tap the agricultural region of the interior. The Charleston & Hamburg, the Georgia Railroad, the Central of Georgia, the Western & Atlantic, the Mobile & Ohio, the New Orleans, Jackson & Northern, and the Louisville & Nashville were all early examples of this tendency. This meant that instead of forming a through system of connecting roads—instead of serving as links in a trunk line—they reached out as conflicting radii from various cities. This, in turn, meant that they carried very little through traffic, but relied almost wholly on local traffic. It was estimated in 1887, for instance, that 80 per cent of the net earnings of the Louisville & Nashville resulted from traffic "which is moved to and from local stations."[15] The handling of local traffic is more costly than hauling traffic on a through basis from seaports to interior carriers, or as an intermediary between other carriers, and this offered another handicap to the southern lines.

Later, when longer lines were put through, connecting the South with the Northeast and with the cities of the Middle West, a new difficulty arose, and this was the imbalance of northbound and southbound traffic. The South tended to send its cotton to Atlantic seaboard markets for export or for delivery to textile mills in New England, and it tended to buy its foodstuffs at Louisville or Cincinnati, thus drawing on the upper Mississippi Valley. Consequently, there was a chronic excess of northbound traffic on the seaboard, and an even more acute excess southbound in the Ohio-Mississippi Valley. This entailed the expense of hauling cars empty in one direction. The magnitude of the disparity is shown in the fact that in 1874-75, southbound traffic on the Louisville & Nashville amounted to 157,520 tons while northbound traffic totalled only 73,410. Twelve years later, the same railroad estimated the excess of loaded cars bound south over those bound north at 57,092.[16]

[14] Testimony of John K. Cowen, president, Baltimore & Ohio R. R., 4 REP. U. S. INDUSTRIAL COMMISSION 318-319 (1900). See also *id.* at 279.

[15] Argument of E. B. Stahlman of the Louisville & Nashville before the ICC, May 27, 1887, in DIGEST OF THE HEARINGS BEFORE SENATE COMMITTEE ON INTERSTATE COMMERCE, SEN. DOC. NO. 244, 59th Cong., 1st Sess. 307 (1906), cited hereafter as ELKINS COMMITTEE DIGEST; WILLIAM Z. RIPLEY, RAILROADS: RATES AND REGULATION 422 (1912).

[16] ELKINS COMMITTEE DIGEST, 311. Albert Fink, also speaking for the Louisville & Nashville, had testified in 1876 that traffic south to and north from Nashville was as follows (U. S. BUREAU OF STATISTICS, FIRST ANNUAL REPORT ON INTERNAL COMMERCE OF THE UNITED STATES, Appendix, 29 (1876)):

	Southbound	*Northbound*
1871-72	161,997 tons	41,531
1872-73	168,573 tons	71,591
1873-74	158,745 tons	75,257
1874-75	157,520 tons	73,410

In addition to all these difficulties of low population density, poor-grade cargo, seasonal business, one-way traffic, light volume, and local rather than through hauls, the southern railroads faced, at one time, an unusually stiff competition from water-borne carriers. In the Seventies and Eighties, river boats still plied not only the Mississippi, the Ohio, and the Tennessee, but also many of the small rivers of the South, both of the coastal plain and of the Mississippi system. It was also true, at that time, that the traditional method of sending goods to New York or other north-eastern points was by coastwise vessels from Atlantic or Gulf Coast ports. The railroads could secure this through traffic only in so far as they could wrest it from the water carriers, with their low rates.[17]

A time later came when the railroads apparently brought most of the water traffic under their domination, or at least their influence, and at that point they sometimes used the plea of steamboat competition as an excuse for certain discriminatory practices. This naturally provoked the retort that the whole emphasis upon the water-borne competition was a sham, and it apparently did become that in part. But it is incontestably true that, in the first decades after the Civil War, riverboat and coastal steamer were a real menace to railroads which were already struggling with other regional handicaps.[18]

These characteristics of the traffic and of the competition had operated, by the beginning of the twentieth century, to shape a distinctive regional rate structure. The basic characteristic of this structure, as will appear, was a generally higher level of rates than prevailed north of the Potomac. Conspicuous exceptions, as will also appear, were made where local competition or the nature of the freight necessitated them. Sometimes these exceptions, because they were invidious, attracted more attention than the basic high level of rates.

[17] Before the Civil War the amount of cotton shipped overland by rail to northern ports or textile centers was negligible, but the traffic increased from 7,661 bales in 1855 to 108,676 in 1860, to 380,813 in 1870, and to 695,622 (out of a total crop of 4,632,313) in 1876. Even in 1876, however, rail movements were customarily combined with water shipment north of Norfolk, and there was still no record of cotton crossing the Potomac in rail transit. In the delivery of cotton to southern ports, also, railroads were encroaching upon water traffic; in 1855, Mobile had received 436,343 bales by river, none by rail; in 1875, this city received 144,263 bales by river, 230,409 by rail. U. S. BUREAU OF STATISTICS, FIRST ANNUAL REPORT ON INTERNAL COMMERCE OF THE UNITED STATES 142, 145 (1876).

[18] The importance of water competition as a justification for special rates at river towns and ports is stressed in petition of the Louisville & Nashville to the ICC and the argument of E. B. Stahlman for the Louisville & Nashville, in ELKINS COMMITTEE DIGEST, 303, 308, 312, 314-318; see also testimony for Southern Railroad, *id.* at 434-435. The United States Industrial Commission's reports contain testimony by some witnesses that this water competition was or had been a very genuine factor: Martin Knapp, Chairman, ICC, 4 REP. U. S. INDUSTRIAL COMMISSION 134, 137 (1900); M. C. Markham, Illinois Central Railroad, 9 *id.* at 435-436 (1901); T. M. R. Talcott, Seaboard Air Line, 9 *id.* at 628-629; and P. J. McGovern, Chairman, Southern Classification Committee, 9 *id.* at 678. Other witnesses, including Judson Clements, Member, ICC (4 REP. U. S. INDUSTRIAL COMMISSION 155 (1900)), Edward P. Wilson, of the Cincinnati Board of Trade (9 *id.* at 696-697 (1901)), and James M. Langley, Merchants Association of New York (9 *id.* at 874-875), expressed the view that water competition no longer meant anything. Langley said, "There is no competition between the coastwise water lines and the railroads" (*id.* at 875). The Commission itself spoke of water competition as a cause for low rates to certain terminal points (4 REP. U. S. INDUSTRIAL COMMISSION 12 (1900)), but in its final report it spoke cautiously of rivalry by water carriers as an "alleged reason" for the long-and-short-haul discriminations, after which it proceeded to show certain cases of discrimination where no navigable waters were involved. 19 *id.* at 374-377 (1902).

Apparently rates in the South had been higher from the earliest days of railroading, for as early as 1848 Daggett's *Railroad Guide* attempted to list the number of railroads, the mileage, and the average rates per ton mile, first- and second-class, for each state. In a situation where every railroad had its own classification and its own rates the calculations could not have been precise, but they were certainly indicative, and it is striking that the states now in official territory, in almost every case, showed lower rates. The exact figures appear in Table 2.

TABLE 2[19]

FREIGHT RATES IN 1848, ACCORDING TO DAGGETT'S *Railroad Guide*

STATES NOW IN OFFICIAL TERRITORY

State	Number of Railroads	Milage	Rates Per Ton Mile	
			First Class	Second Class
Maine	3	226	5.68	3.38
New Hampshire	2	99	5.25	5.00
Vermont	1	33	4.00	4.00
Massachusetts	36	1929	5.47	4.54
Rhode Island	2	91	6.37	4.39
Connecticut	4	253	5.75	3.50
New York	20	798	9.04	5.79
New Jersey	4	155	13.57	11.66
Pennsylvania	9	355	6.75	5.25
Maryland	9	661	4.56	3.12
Ohio	4	307	6.60	4.62
Indiana	1	86	8.00	5.81
Michigan	3	241	8.44	6.50

STATES NOW IN SOUTHERN TERRITORY

State	Number of Railroads	Mileage	Rates Per Ton Mile	
			First Class	Second Class
North Carolina	2	248	9.83	6.37
South Carolina	2	204	10.75	5.50
Georgia	5	602	9.33	4.78
Mississippi	1	70	24.39	17.30
Alabama	1	67	16.83	8.00
Kentucky	1	28	9.00	9.00

From the middle of the century until its end rates generally fell. Southern rates bore a share of the reduction, but relatively they remained higher than rates in the East, and, in the case of local rates (*i.e.*, rates charged between points located on the same road), did not even decline proportionately. The Interstate Commerce Commission fully demonstrated this fact in 1902, when it made an elaborate historical analysis of rates for the preceding forty years. As part of this analysis, local rates on thirty-three roads were studied in detail. Table 3 shows the rate in cents

[19] CAROLINE E. MACGILL, *et al.*, HISTORY OF TRANSPORTATION IN THE UNITED STATES BEFORE 1860 576 (1917). The corresponding figures for Virginia, partly southern, partly official, were 6 railroads, 264 miles, 10.44 first class, 4.69 second class.

per hundred pounds on first- and second-class commodities, as charged for trips approximating 200 miles on the lines which were in official and southern territories. This illustrates emphatically the higher level of southern local rates, and their tendency to remain fixed during a period when other regions were experiencing a reduction of such rates.

TABLE 3[20]

LOCAL RATES BETWEEN 1872 AND 1900 FOR FIRST- AND SECOND-CLASS COMMODITIES FOR TRIPS APPROXIMATING 200 MILES, ON VARIOUS RAILROADS IN SOUTHERN AND OFFICIAL TERRITORIES

(The roads lettered (o) are in what is now official territory; those marked (s) are southern. The Savannah, Florida & Western became part of the Atlantic Coast Line system.)

Railroad	Distance of Haul	First Class					Second Class				
		1872-1876	1884-1886	1887	1890	1900	1876	1884-1886	1887	1890	1900
(o) Maine Central	200	54	..	..	..	45	44	..	..	..	35
(o) N. Y. & N. E.	204	..	42	38	30	30	..	37	34	25	26
(o) N. Y., L. E., & W.	203	..	35	35	35	35	..	28	30	30	30
(o) Lehigh Valley	208	58	41	35	35	35	46	32	30	30	30
(o) Pennsylvania	194	45	35	33	33	33	30	30	28	28	28
(o) Buf., Roch., & Pitts.	206	..	27	30	26	30	..	22	26	22	26
(o) Lake Shore	198	..	40	30.5	30.5	33	..	34	27	27	28.5
(o) Michigan Central	209	..	45	33	33	37	..	35	30	30	32
(o) Grand Rapids & Md.	200	..	52	35	35	40	..	42	30	30	34
(o) Grand Trunk	204	..	41	40	26	30	..	32	30	24	26
(s) Louisville & Nash.	200	..	74	74	74	74	..	64	64	64	64
(s) Sav., Fla., & Western	200	..	85	88	85	85	..	74	75	74	74

Although the southern rate structure manifested one of its most extreme differentials in the matter of local rates, the higher southern level was by no means confined to this phase, and southern class rates, generally, were much higher than those in official territory. This may be illustrated by a comparison of rates in official territory from New York to Chicago, a distance of 890 miles, and from Louisville to Atlanta, which is only 472 miles. Despite the shorter distance, rates for all classes of commodities were consistently higher from Louisville to Atlanta throughout the last quarter of the ninetenth century. This is shown in Table 4.

Rates within the South, therefore, had already become fixed at levels higher than those within the East. By a fairly natural extension, this meant that rates from southern points to points in the East were higher than for similar distances wholly within official territory. But while this interterritorial differential should not be minimized, it is important to recognize that (1) interterritorial rates were not as high as those wholly within the South, and (2) where southern railroads had a

[20] Table constructed from data in INTERSTATE COMMERCE COMMISSION, RAILWAYS IN THE UNITED STATES IN 1902, PART II, A FORTY YEAR REVIEW OF CHANGES IN FREIGHT RATES 163-209 (1903). This report superseded the rate data prepared by C. C. McCain and published in 1892 by the Finance Committee of the Senate under the title, WHOLESALE PRICES, WAGES AND TRANSPORTATION, SEN. REP. No. 1394, 52d Cong., 2d Sess. (1892). The FORTY YEAR REVIEW contains incomparably full information, but handles it in such a way as to make regional comparisons difficult.

TABLE 4[21]

FREIGHT CHARGES FOR VARIOUS CLASS COMMODITIES, NEW YORK TO CHICAGO AND LOUISVILLE TO ATLANTA, FROM 1862 TO 1900 (CENTS PER 100 POUNDS)

Year	First Class		Second Class		Third Class		Fourth Class	
	New York to Chicago	Louisville to Atlanta	New York to Chicago	Louisville to Atlanta	New York to Chicago	Louisville to Atlanta	New York to Chicago	Louisville to Atlanta
1862.....	160	...	128	...	107	...	66	..
1870.....	140	161	125	134	100	114	80	84
1871.....	150	150	130	125	100	100	70	85
1880-1881.....	60	119	50	104	40	89	28	76
1885.....	75	107	60	92	45	81	35	68
1887.....	75	107	65	92	50	81	35	68
1890.....	75	107	65	92	50	81	35	68
1895.....	75	107	65	92	50	81	35	68
1900.....	75	107	65	92	50	81	35	68

competitive incentive to do so, they reduced rates considerably below the norm. Both of these factors are illustrated in the rate from Atlanta to New York, which, though not nearly so low as the rate for the comparable haul in official territory from New York to Chicago, was almost as low as the much shorter haul, within southern territory, from Louisville to Atlanta. Clearly the southern road, in this case, was accepting a lower rate for its portion of the haul in order to reach the metropolitan market. No doubt it was stimulated to do so by the competition of coastwise shipping, as is indicated by the fact that between Atlanta and Chicago, where such competition did not exist, rates were substantially higher. But the longer haul from Chicago to Savannah, to connect with ocean carriers, actually cost less than the haul to Atlanta.

TABLE 5[22]

INTRATERRITORIAL CLASS RATES AS CONTRASTED WITH INTERTERRITORIAL CLASS RATES, BETWEEN 1876 AND 1900
(Numbers are cents per 100 pounds for first-class commodities)

	Miles	1872–76	1882–86	1887	1890	1900
Intraterritorial						
Official territory						
New York to Chicago.....	909	75–125	45–75	75	75	75
New York to Pittsburgh.....	440	45	43	45	45	45
Southern territory						
Louisville to Atlanta.....	472	150	119	107	107	107
Memphis to Atlanta.....	419	105	104	103	103	103
Memphis to Charleston.....	728	140	92	91	91	91
Interterritorial						
New York to Atlanta.....	876	145	114	108	114	114
Chicago to Atlanta.....	733	150	157	147	147	147
Chicago to Savannah.....	1002	162	145	135	135	135

[21] Table constructed from data in the FORTY YEAR REVIEW, cited *supra*, note 20, at 23, 39, 44, 78, 127.

[22] Table constructed from data in *id.* at 23, 121, 131, 132, 139, 168. Where more than one rate is available within the time spans indicated in the table, I have included what seemed to be the more representative rate or, where one date is used, the rate chronologically nearest to that date.

All this becomes extremely complex in detail, but it seems to reduce itself to a fairly simple basic policy: because of economic circumstances, southern railroads maintained a higher rate level than those in other parts of the country. This affected interterritorial rates also. But where competitive necessities or market possibilities offered an inducement, exceptions were made which mitigated, if they did not eliminate, the differential. These exceptions took various forms: on the seaboard, through traffic to North Atlantic ports received reductions to meet coastal steamer competition; within the South, river towns or others with real or artificially created competitive advantages were designated as "basing points" and as such received lower rates than neighboring communities. Here arose an easily dramatized long-and-short-haul abuse which violated the Interstate Commerce Act, became a *cause célèbre,* and was generally regarded as the characteristic feature of the southern rate structure. But the low rate to the basing point stood in bold relief primarily because of the high rate level against which it operated. The primary factor was the general rate level. As the Industrial Commission declared in 1902, "Local rates have decreased very unevenly in different parts of the country. [Reduction] does not seem to have occurred in the Southern States. . . . Freight rates in the Southern States are very much higher per mile than for any other section of the country."[23]

Stated in different terms, this means that the southern railroads intended to levy higher rates upon the traffic of the South than eastern railroads levied upon the traffic of their region. But it does not mean that they wished to throttle southern industry. What it may signify is that, where later critics sought to encourage southern industry by destroying freight differentials, the southern railroads were prone to attack the problem by making specific exceptions to the structure of differentials. For instance, as will appear subsequently, they moved vigorously to establish rates that would place southern cotton textiles on a sound competitive basis in the northern market. In doing so at a time when the rail system of the country consisted of dozens of independent lines, they could always find a northern carrier which would respond to the inducement of extra traffic by joining them in establishing a special rate to northern markets.

So long as the differential in the rate structure represented nothing more than the policy of southern railroads to levy a higher average rate, exceptions could always be made to avoid flagrant disadvantage to southern products in northern markets. But there was clearly an economic danger for the southern economy in the existence of such differentials. This danger was greatly enhanced when the collective action of the railroads and the tacit sanction of the Interstate Commerce Commission molded these aggregations of separate differentials into sharply defined, collectivized, regional structures, with a system of "private judicature" to extend the

[23] 19 REP. U. S. INDUSTRIAL COMMISSION 373 (1902). In testimony before the Commission, a member of the ICC declared that "rates are usually lower in the north than they are in the south, both local and through," and the president of the Baltimore & Ohio, John K. Cowen, agreed that "the Southern rates I know are higher, but that is a very sparsely populated country and they are bound to be higher. . . ." 4 *id.* at 155, 318 (1900).

parity of rates throughout one region and thus to sharpen the contrast with the disparity of rates in the adjoining region. The danger was further and more acutely enhanced when the railway interests of official territory began to recognize that these institutionalized rate differentials could be used as a barrier to exclude producers from other territories, and thus to monopolize the richest metropolitan markets for their own shippers.

III

INSTITUTIONAL DEVELOPMENT OF TERRITORIAL UNITS AND REGIONAL DIFFERENTIALS

The history of a region, far more than that of a nation, deals with intangibles. The nation is an entity; it has governmental machinery, territorial boundaries, citizens, and jurisdiction. The region has none of these. The South, for instance, is not a political entity; the only political entities are twelve states, more or less. It has no citizens, and though the people are alleged to conform to a regional type, they in fact exhibit a wide range of traits, and can be considered homogeneous only by that special type of part-truth known as generalization. Of course, even the nation is not as much an entity as the terms "American policy," "American tradition," *et cetera,* would suggest, but generalization reaches a peculiarly treacherous phase when applied to regional or sectional topics.

If the freight rates of the South and of other territories had remained what they were in origin—merely the aggregation of all the rates levied by separate railroads, independently of each other—then generalizations about a "southern rate structure" would be as elusive as those about the "southern character," and would be specimens of the same fallacy of treating a mere tendency as if it were an institution. Considered individually, southern railroads vary among themselves as much as, collectively considered, they may vary from the roads of another region.[24] But the analyst need not generalize upon them, for they have generalized themselves. Although southern rail rates originated with separate roads, and though there yet remains some basis for independent action, the fact is that rate-making became collectivized seventy years ago, and has so remained ever since. Not, as one might suppose, by the action of the Interstate Commerce Commission, but through the work of associations of railways, later sanctioned by the Interstate Commerce Commission, a distinctive southern rate structure applicable to an explicit southern rate territory was created.

In the matter of railway rates, then, as in almost no other regional matters, the sectional tendency took a tangible institutional form. Since Appomattox, "the South" has had no boundaries, no capital, no political authority. But the Southern Classifi-

[24] "As between individual railroads in any one of the existing historic rate groups, operating costs vary both above and below the group average. If the variation of the outlying cases from the average is materially wider than any variations between two or more territorial group averages, would the substantial rights of the carrier be violated by dissolving the groups and nationalizing the freight rate structures?" ALLDREDGE, THE INTERTERRITORIAL FREIGHT RATE PROBLEM OF THE UNITED STATES, H. R. Doc. No. 264, 75th Cong., 1st Sess. 54 (1937).

cation Bureau and the Southern Freight Association have boundaries more tangible than the Confederacy ever achieved; their capital is Atlanta; and there they make decisions which apply from Chesapeake Bay to the Gulf of Mexico. The fact that a member road retains the legal right to reject the group decision and to establish an independent rate does not seriously qualify the fact that, in effect, rates are made by regional associations.

The shaping of the structure into such a distinctive sectional framework prepared the way for the normal and universal friction between various shipping interests to be formulated into sectional patterns and accentuated along sectional lines. This would have happened in any case, but the institutional structure greatly enhanced it.

As late as the 1870's and Eighties, there were countless different rate systems in the United States. The railway network consisted not of a few trunk lines, but of many little connecting roads, and each road had its own classification and its own tariffs. Some had a number of classifications, varying with the direction of the traffic or what not.[25] At one time there were 138 separate classifications in what is now official territory alone, and the shipper consigning goods to any great distance had to plunge boldly into the unknown.

It was inevitable that, as through traffic increased and connecting lines were developed, some more general system or systems of rates would replace the impenetrable mass of separate rate schedules which had grown up in the era of unconnected roads serving local markets. But though the change itself was certain to occur, it was not certain whether this regimentation of rates would be achieved by government control or by the collective action of the railroads, nor was it certain whether several regional authorities or one national authority would emerge, though even a national authority could hardly impose a uniform national structure, in view of regional differences in the economy.

At a later time the railway system became genuinely national, but at this formative stage in the development of rate structures the railways of the country fell more or less naturally into regional groupings. The Mississippi, the Ohio, and even the Potomac provided serious barriers to uninterrupted shipment from South to North, and most of the traffic was regional. Not until 1874-1875 did James B. Eads and Albert Fink complete the first bridges which enabled rail traffic to span the broader reaches of the Mississippi and the Ohio. With this physical and economic isolation, cooperative action naturally moved along sectional lines, and, as it happened, the first major cooperative association of railroads originated in the South. This was the Southern Railway & Steamship Association, which was formed in 1875.[26]

[25] Before 1887 a shipper over the Wabash Railroad might be compelled to consult six classifications: in the area of the Southern Railway & Steamship Association, eighteen classifications; in the Mississippi Valley, five; in the "revised western," nine; in the eastern trunk-line, thirteen; in western trunk-line, five. Some of these applied to traffic only in one direction. 19 REP. U. S. INDUSTRIAL COMMISSION 391 (1902). In the South "the Savannah Line used nine classes, and the Charleston and Coast Lines worked five and six classes." Hudson, *The Southern Railway and Steamship Association*, 5 QUAR. J. OF ECON. 70, 84 (1891).

[26] Hudson, *loc. cit. supra*, note 25, at 70-94, has an excellent account of the history of this organization.

The decade of the Seventies found southern railroads struggling to recover from the devastation of the Civil War, and to maintain their solvency upon a very small volume of traffic. Though there were numerous points where two or more roads were in competition, there was none where the volume of traffic was more than one road could have handled.[27] Competition for traffic, therefore, was intense, and had its impact upon roads so close to bankruptcy that only a minor rate war was required to finish them. The only salvation of the roads seemed to lie in an agreement to apportion all competitive traffic on a pro rata basis. But apportionment of traffic could not be stabilized without equalization of rates, and this meant that the individual roads must surrender the right to fix their own rates at competitive points.

The formation of railroad pools later came under criticism because of its monopolistic tendency, and antitrust legislation later limited the sphere of collective action. But on December 21, 1874, when the railroad representatives of the southeast met at Macon, Georgia, they did so in the unabashed conviction that group control would serve to avert the financial collapse of the southern transportation system and to eliminate recognized evils such as rebates and discriminatory charges. At a subsequent meeting in Atlanta, twenty-two railroads and three steamship companies formally combined themselves in the Southern Railway & Steamship Association, bound themselves to a written agreement containing thirty articles, and selected Albert Fink, of the Louisville & Nashville, as their general commissioner.[28]

Fink was a man of remarkably versatile genius. A native of Hesse-Darmstadt, he came to America when the democratic movement of 1848 failed in Germany. Beginning his American career as a civil engineer and bridge builder, he constructed a number of important railway bridges, but his talent in the operational field led to his appointment as a vice-president of the Louisville & Nashville and to his writing, in 1874, a report on the cost of transportation. This report established Fink as "the father of railway economics" in America. By 1875 he was ready to retire from business, but he deferred this step in order to accept the commissionership of the Southern Association. To this post he brought not only unusual intellectual power and great force as a leader, but also intense conviction that pooling was a meritorious and beneficial practice. Although he served as commissioner for only six months, he created for the southern roads the first successful large-scale railway pool in America.[29]

[27] *Id.* at 70.

[28] Account of formation in *id.* at 71-72. Articles of agreement in U. S. BUREAU OF STATISTICS, FIRST ANNUAL REPORT OF INTERNAL COMMERCE OF THE UNITED STATES, Appendix, 16-19 (1876). The member railroads included the Western & Atlantic, the Central of Georgia, the Southwestern, the Savannah, Griffin & North Alabama, the Mobile & Girard, the Augusta & Savannah, the Eatonton Branch Railroad, the Georgia Railroad, the South Carolina Railroad, the Richmond & Danville, the Piedmont Railroad, the North Carolina Railroad, the Atlanta & Richmond Air Line, the Memphis & Charleston, the East Tennessee, Virginia & Georgia, the Western of Alabama, the Montgomery & Eufaula, the Wilmington, Columbia & Augusta, the Charlotte, Columbia & Augusta, the Wilmington & Weldon, the South & North Alabama, and the Nashville, Chattanooga & St. Louis.

[29] See the sketch of Fink in 6 DICTIONARY OF AMERICAN BIOGRAPHY 387-388 (1931), and Hudson, *loc. cit. supra*, note 25. Also see the numerous transcripts of testimony which Fink offered in explanation and defense of his ideas. These appear in U. S. BUREAU OF STATISTICS, FIRST ANNUAL REPORT ON IN-

Much of the work of the Association lies outside the limits of this paper (for instance, the division of freight between member roads), but one of its major functions was the control of competitive rates, especially to the East, and thus, indirectly, the creation of a regional rate structure. By the Association's first articles of agreement in 1875, the twenty-two member roads gave to the commissioner unequivocal power "to decide as arbitrator, . . . when they cannot be agreed upon between the members of the association . . . the competitive rates between rail and water lines . . . and the regulation of rates between the various centers of competition when they discriminate against certain localities . . . [and] the adoption of local rates protective of competive rates." The Association also stated its purpose to "provide proper means to enforce effectively and promptly all agreements that may be entered into." As the articles were enlarged and renewed from year to year, a fully developed machinery for the making and enforcement of rates emerged. Just before the enactment of the Interstate Commerce Act this machinery consisted of an executive committee, with a subsidiary committee on rates. The rate committee was authorized, upon the unanimous agreement of its members, "to make all rates and classifications to and from all points East and West into Association territory." Failing such agreement, the executive committee was empowered to act, with rights of review and final and conclusive action by a board of arbitration. Members were specifically "forbidden to reduce the rates made by the Rate Committee," and if accused and found guilty by the board of arbitration of making such reductions, the members were subjected to heavy fines.[30] The reality of such penalties is indicated by the fact that one road was fined $5,000 and others were tried by the arbitrators; the vigilance of enforcement is indicated by the fact that inspectors of the Association between October 1, 1886, and June 1, 1887, corrected weight or classification data on thousands of shipments of goods in order to prevent any indirect cutting of rates by means of under-weighing or under-classifying shipments.[31] It was generally agreed that the Association effectively accomplished its purpose, which means that a regional authority had replaced independent action as a means of rate making, as early as 1880.

Not only did the operation of the Southern Association tend to bring rates under the control of a single regional authority; it also tended to maintain the higher regional level of rates which economic conditions had made necessary. Had southern

TERNAL COMMERCE OF THE UNITED STATES, Appendix 1-48 (1876); THE RAILROAD PROBLEM AND ITS SOLUTION AS EXPLAINED BY ALBERT FINK BEFORE THE COMMITTEE ON COMMERCE OF THE U. S. HOUSE OF REPRESENTATIVES (1880); ARGUMENT OF ALBERT FINK BEFORE THE COMMITTEE ON COMMERCE OF THE U. S. HOUSE OF REPRESENTATIVES (1882); ARGUMENT BEFORE THE COMMITTEE ON COMMERCE OF THE U. S. HOUSE OF REPRESENTATIVES BY ALBERT FINK (1884); TESTIMONY OF ALBERT FINK BEFORE THE SELECT COMMITTEE ON INTERSTATE COMMERCE OF THE UNITED STATES SENATE (1885); and REPORT OF THE SENATE SELECT COMMITTEE ON INTERSTATE COMMERCE, SEN. REP. No. 46, 49th Cong., 1st Sess. 89-126 (1886).

[30] First articles of agreement in U. S. BUREAU OF STATISTICS, FIRST ANNUAL REPORT ON INTERNAL COMMERCE OF THE UNITED STATES, Appendix 16-19 (1876); articles for 1886-87 and 1887-88 in Hudson, *loc. cit. supra*, note 25, at 115-130.

[31] Hudson, *loc. cit. supra*, note 25, at 80-92.

railroads been operating in unrestricted competition, their rivalry for traffic would probably have resulted in a reduction of rates far below the point indicated by economic factors. But competition in rates was eliminated. A vice-president of the Louisville & Nashville, testifying on this matter in 1887, declared:

> The Southern Railway and Steamship Association was one of the earliest organizations of that kind created in this country. Through it and through similar appliances we have been able to adjust our trouble, so that we have been comparatively free from wars. The Louisville and Nashville Company, although it traverses a vast territory and is considered a strong line, is not in a position to arbitrarily demand anything or to fix an arbitrary adjustment of rates to and from any point. . . . The lines directly interested in . . . traffic to and from . . . various centers come together and agree among themselves what the rates shall be, and if they cannot agree, the question is submitted to arbitration. This method . . . has enabled the lines of the South to avoid the rate wars so frequent between the trunk lines of the East and the railroads of the West.[32]

Not for long, however, did the southern area remain in exclusive possession of the pool. After only six months of success in organizing the Southern Association, Albert Fink was called to the building of an even greater combination—the Trunk Line Association, which included all the major roads from the Middle West to New York. This was easily the most important pool in the country, and by 1885 it had reached what is described as "a high degree of efficiency."[33] Also by that date, a Western Freight Association had emerged from earlier pooling attempts in the West, and, so far as the voluntary action of railroads could accomplish it, the country had already been divided into its principal territorial groupings.

The enactment of the Interstate Commerce Act in 1887 and of the Sherman Act in 1890 presented a major challenge to the pools. The first of these measures specifically forbade the pooling of freights, and the second prohibited combinations in restraint of trade. Clearly, the railroads could not continue to apportion freight, and it was a question whether they could legally agree to equalize and maintain rates. In 1897 and 1898, in the *Trans-Missouri Freight Association* case and the *Joint Traffic Association* case, the Supreme Court held such rate-fixing practices to be illegal.[34]

With both of the major functions of the pool thus outlawed, the regional associations faced a precarious future. But in fact the newly formed Interstate Commerce Commission had neither the power, the facilities, nor the desire to fix rates, and no one wanted to go back to the chaos and uncertainty of an arrangement in which each line maintained its own separate system of classification and rates. Moreover, the time had now arrived when the major part of the traffic was through traffic,

[32] Testimony of E. B. Stahlman before ICC, May 27, 1887, in ELKINS COMMITTEE DIGEST, 312. Cf. the testimony of William Z. Ripley, Jan. 7, 1901, that "the existence in a very large part of the southern states of what is practically a pool makes the freight rates into and out of those southern states considerably higher than in those parts of New England where competition still prevails." 9 REP. U. S. INDUSTRIAL COMMISSION 289 (1901).

[33] 19 REP. U. S. INDUSTRIAL COMMISSION 333 (1902); Hudson, *loc. cit. supra*, note 25, at 72.

[34] United States v. Trans-Missouri Freight Association, 166 U. S. 290 (1897); United States v. Joint Traffic Association, 171 U. S. 505 (1898).

on which no rate could be fixed without joint action by the roads involved. Consequently the rate associations were, in effect, permitted to reorganize and to continue on a conference basis, though without power to coerce their member roads. As early as 1889 the Interstate Commerce Commission officially stated that it intended to permit the carriers to work out all details of tariffs, and in 1890 it flatly declared that "railroads in the matter of rates, cannot be considered singly. In that respect, the railroad interest must be regarded as substantially a unit."[35] In 1889 the Commission held that, in determining the reasonableness of a rate, it was immaterial whether railroad companies had acted jointly or separately in deciding upon such a rate.[36] Further encouragement to joint action had also been given by the ruling that if a railroad wrote to the Commission acknowledging the authority of an association to issue tariffs in its behalf the Commission would thereafter accept schedules filed by the association as if they had been filed by the member roads.[37] These rulings were cast into some shadow by the Supreme Court decisions of 1897-98, but they had indicated the attitude of the Commission, and, essentially, that attitude remained; nor was the Commission isolated in its view, for as early as 1899 the Attorney General issued a ruling in which he recognized the necessity of rate conferences, and sanctioned their continuance.[38]

Thus the Commission indicated a complete readiness to recognize the joint action of the railroads themselves in the rate-making process. There was a question, however, whether it would prove equally tolerant of the regional divisions which had emerged from the formation of the early pools, or whether it would insist upon a greater degree of national uniformity. This question did not arise actively in connection with the actual tariffs, for it was conceded that they could not be reduced to uniformity, but it did arise very emphatically in connection with classification.

Classification of freights, as has been indicated, is distinct from rate making, in that it determines how the burden of rates shall be distributed among the various categories of freight but fixes no specific charges. In the period of independent action by separate roads each road had maintained its own classification, as well as its own rate schedule. Pools like the Southern Railway & Steamship Association had tended to collectivize both. But on the eve of the Interstate Commerce Act there were still fifty different classifications in effect in what is now official territory.[39] The imminence of the Act at that time persuaded the roads that a greater uniformity would

[35] THIRD ANN. REP. I.C.C. 235 (1889); FOURTH ANN. REP. I.C.C. 28 (1890).

[36] New Orleans Cotton Exchange v. Cincinnati, N. O. & T. P. Ry., 2 I.C.C. 289 (1888).

[37] *In re* Joint Tariffs, SEVENTH ANN. REP. I.C.C. 131 (1893).

[38] The letter of the Attorney General to the I.C.C., December 30, 1899, replied to the question whether rate associations were subject to prosecution under the Sherman Act. To justify prosecution, he replied, "It must be shown that there is a 'contract, combination or conspiracy in restraint of trade. . . .' In the first place, there is no contract, combination or conspiracy shown. There is consultation by representative railroad men in committee respecting suggested changes in classification. There is subsequent independent action by railroad companies in the adoption of the new classification recommended by the committee. . . . It must be conceded that a common classification by railroad companies operating in the same territory is a desirable thing. . . ." THIRTEENTH ANN. REP. I.C.C. 16, 18 (1899).

[39] ELEVENTH ANN. REP. I.C.C. 62 (1897).

be required in the future, and in February, 1887, the railroads of the Northeast appointed a committee to work out a uniform classification. This committee met, and in the space of eleven days, "with a zeal and pertinacity unprecedented," it devised a single system of classification, which was adopted.[40]

Ironically, the promptness of this action created the false impression that the difficulties of classification could easily be solved, and that a nationally uniform classification would soon be devised. Apparently Congress would have enacted a law requiring such a classification if it had not believed that voluntary action would soon achieve the objective. In 1891 and 1893 the Commission recommended that a uniform classification be imposed by law, and in the meanwhile the railroads had appointed a standing committee which appeared to be making progress.

Yet at this very time, when the highest hopes of nationalization prevailed, the process of regionalization was being completed. The western roads had adopted a joint western classification in 1883; the action of the eastern roads, as just described, had placed their classification on a regional basis in 1887; and the southern carriers in 1889 adopted the classification already in use by the Southern Railway & Steamship Association. This effectively concluded the blocking out of the separate classification territories which have remained to the present. Regional peculiarities of traffic prevented the railroads in different territories from agreeing upon uniform classification.[41] Many of their objections to uniformity seemed to have real merit, and the Commission slowly modified its insistence upon uniformity. A few minor steps were taken, such as the adoption, in 1911, of a nationally uniform system of description (as to packing, etc.) of the freight articles to be classified, and the agreement, in 1919, to publish all three classifications in parallel columns in a single book, instead of maintaining three separate publications.[42] But these advances left the separate territories essentially undisturbed, and by 1916 the Commission at last seemed to have accepted the territorial divisions as a permanent fixture, for it stated in its annual report that "the existing classifications have grown up in the light of the conditions prevailing in the different classification territories."[43]

If, in the end, the Commission accepted territorialism in classification, it had accepted territorialism in rate making from the beginning. In the case of *Schumacher Milling Company v. Chicago, Rock Island, and Pacific Railway,* in 1893, the Commission had declared that the fact that different rates and classifications were in force in different sections of the country would not, in itself, "warrant an extension

[40] The best account of the history of attempts to secure uniform classification is Barton, *Uniform Freight Classification and the Interstate Commerce Commission,* 18 J. OF LAND AND PUB. UTIL. ECON. 312-322 (1942). Also see FIFTH ANN. REP. I.C.C. 23, 24 (1891); 9 REP. U. S. INDUSTRIAL COMMISSION 656-662 (1901); 19 *id.* at 391-397 (1902); Class Rate Investigation, 262 I.C.C. 447, 459-465 (1945).

[41] For statement of the regional objections to uniformity, see ELEVENTH ANN. REP. I.C.C. 64 (1897); 4 REP. U. S. INDUSTRIAL COMMISSION 100, 217, 277 (1900); 9 *id.* at 633, 656 (1901).

[42] Barton, *loc. cit. supra,* note 40, at 319; testimony of J. A. Little, Nebraska State Railway Commissioner, in *Hearings before Subcommittee on Interstate Commerce on S. Res. 99,* 76th Cong., 1st Sess. 277 (1939).

[43] THIRTIETH ANN. REP. I.C.C. 13 (1916).

of the lower rate and classification to the section where the higher rate and classification are applied."[44]

With the Commission declaring that "rate-making and classification committees . . . perform a valuable and important service to the public as well as the railroads,"[45] such organizations continued to play a vital part in initiating rates. Consequently they have continued to the present time, with various shifts in organization but with a great deal of basic continuity from the pools of the Eighties. By the beginning of the present century the Joint Traffic Association was the principal agency of joint action in the East. The western roads had been ordered under the Sherman Act to dissolve their Trans-Continental Freight Rate Committee, but within two months after the decision they had formed the Trans-Continental Freight Bureau, which continues to the present time. In the South, the Southern Railway & Steamship Association had succumbed in 1893 to the combined impact of the laws against pooling and the panic of 1893, and two groups, the Mississippi Valley and the Southeastern Freight associations, had taken its place. Later a third, the Associated Railways of Virginia and the Carolinas, further subdivided the South.[46] But the essential continuity which projected itself through all these changes is shown by the fact that when the Southern Freight Association was formed in 1920, it included not only railway members, but also the same steamship lines which had constantly been affiliated with the railroads of the Southeast, ever since the original Southern Railway & Steamship Association. They still maintain this affiliation in 1947.[47]

At the present, each of the three classification territories and the five rate territories has its corresponding classification and rate associations, and, in addition, certain subdivisions within the regions necessitate additional association groups. In official territory the Trunk Line Association, Central Freight Association, and New England Freight Association are all engaged in rate making, while the Official Classification Committee handles all questions of classification except those on intrastate traffic in Illinois. In the South, the Southern Freight Association and the Southern Classification Committee, which was established in 1899 and reorganized on its present basis in 1917, are the principal agencies.[48]

In terms of authority and of formal constitution, these associations are somewhat intangible. They are voluntary, unincorporated associations, which until the First World War were not required to file with the Interstate Commerce Commission a statement of the nature of their organization,[49] and which sometimes refrained from

[44] 6 I.C.C. 61 (1893); also see Western Newspaper Union v. Aberdeen & Rockfish R.R., 34 I.C.C. 326, 328 (1915).

[45] Harvard Co. v. Pennsylvania R.R., 4 I.C.C. 213, 223 (1890).

[46] *In re* Transcontinental Freight Bureau, 77 I.C.C. 252 (1923); 19 REP. U. S. INDUSTRIAL COMMISSION 336, 337 (1902).

[47] Testimony of Joseph G. Kerr, chairman, Southern Freight Association, in *Hearings before the Committee on Interstate Commerce on H. R. 2536*, 79th Cong., 2nd Sess. 1249 (1946).

[48] On the organizations at present, see testimony of James E. Kilday, *id.* at 823-833, 839-885; BOARD OF INVESTIGATION AND RESEARCH, REPORT OF RATE-MAKING AND RATE PUBLISHING PROCEDURES OF RAILROAD, MOTOR, AND WATER CARRIERS, H. R. Doc. No. 363, 78th Cong., 1st Sess. 7-54 (1943).

[49] *Hearings before Senate Committee on Interstate Commerce on S. 942*, 78th Cong., 1st Sess. 977 (1943).

drawing up formal articles of agreement. In a legal sense, they have no compulsory power, and their decisions are not binding upon any road which does not individually accept them, though members are pledged to delay for a fixed period before taking independent action. In an operational sense, however, the pressure to accede to the opinion of the majority is no doubt strong, not only because of a sense of community of interest, but also because through rates necessitate agreements, because a nonconforming member may be subjected to various reprisals, and because the majority is likely to appeal to the Interstate Commerce Commission to suspend the independently filed rate. If such an appeal is successful, the effect is to give legal force to the decision of the association.

If these associations are informal in constitution, they are by no means so in procedure. Indeed, they operate as quasi-judicial bodies, and when a change of classification or of tariff is proposed by carrier or shipper they place it on the docket for public hearings which are announced well ahead of time. Many routine proposals are disposed of by mail, but important changes are treated in a way which justifies the term "private judicature." Recent critics have assailed the vesting of this function in private hands, but no one questions that, by whomever administered, the system must operate with some degree of collaboration, for every change of rate at one point is likely to impinge upon scores of other rates from competitive points, and no change can wisely be made without permitting all interested shippers and carriers to express their views.[50]

In terms of regional rate differentials, the vital significance of these territorial associations lay in the fact that the Interstate Commerce Commission tended to accept the work of each of them, thus conceding the validity of each region's operating separately, and embracing sectional disparities which it would scarcely have evolved for itself. Moreover, the Commission possessed and used the power to sanction differentials, thus giving legal authority to what was otherwise merely a business arrangement among railroads, or, more properly, an economic gap between separate business arrangements.

This paper has already noted the initial readiness of the Commission to accept territorialism in the fixing of tariffs, and its later acceptance of the same factor in classification, but for many years the cases which came before the Commission were so limited in scope that no formal recognition of territories or territorial distinctions was necessary. In 1920, however, when Congress adopted the Transportation Act of that year, it provided that recognition should be given to "such rate groups or territories as the Commission may from time to time designate."[51] This, for the first time, gave the Commission authority to recognize, and even to alter, the territories, and it led to a serious consideration of the whole matter in a case known as *Ex parte 74*, in 1920.[52] At this time, the Commission determined that it would

[50] For account of the procedure of these organizations, see references in note 48.
[51] 41 STAT. 488 (1920).
[52] Increased Rates, 1920, 58 I.C.C. 220 (1920).

recognize the existing territories. The wholeheartedness with which it did so is indicated by a dictum in a later case, that "one of the best tests of the reasonableness of a rate is by comparison with rates on like traffic in the same territory."[53] But the first important application of this new control occurred when the Commission instituted a sweeping review and revision of southern class rates. This *Southern Class Rate Investigation,* completed in 1925, was followed by several other territorial surveys.[54] In each of them, the tendency was to start with the existing rate structure, reared by the freight associations and classification committees, and to impose modifications upon these systems. In a qualified sense, the decisions of groups which could not legally impose their will upon their own members were now being enacted, by Interstate Commerce Commission endorsement, into administrative law.

The regional differentials of fifty years before were in pattern still somewhat the same, but in form they had evolved astonishingly. Having begun as the aggregate of individual actions by individual roads, they had first been collectivized by private, voluntary action on a territorial basis. Then, through acceptance and authorization by the Interstate Commerce Commission, they had achieved a status that entrenched them firmly behind the barriers of legal sanction.

IV

THE RATE STRUCTURE AND REGIONAL ECONOMIC DISCRIMINATION

The two preceding sections of this paper have traced the development of two factors, the importance of which, in the broad historical sense, is undisputed. Despite present controversies which rage around the questions of the effect of rate differentials upon the economy of the South, and of the degree to which rate associations are or are not monopolistic, all parties are agreed that the rate structure of the South evolved with different patterns and higher general levels than that of the eastern railroads, and that the formation of classification and rate committees along territorial lines contributed to the institutional fixing of these sectional patterns, especially since the Interstate Commerce Commission recognized the territories as units, conceded to the territorial associations a recognized function as the agents of roads in their geographical groups, and gave legal sanction by its rulings to territorial differentials.

These basic points of agreement are important to emphasize, for the reason that in 1945 the dispute over differentials entered a new and confusing phase. In that year the southern governors, including Ellis Arnall of Georgia, won a decision from the Interstate Commerce Commission ordering an adjustment of class rates in southern and official territories to bring the two structures nearer to a parity.[55] The Com-

[53] Traffic Bureau of Sioux City Chamber of Commerce *et al.* v. Baltimore & Ohio R.R., 120 I.C.C. 7, 14 (1926).

[54] Southern Class Rate Investigation, 100 I.C.C. 513 (1925); Consolidated Southwestern Cases, 123 I.C.C. 203 (1927); Western Trunk-Line Class Rates, 164 I.C.C. 1 (1930); Eastern Class Rate Investigation, 164 I.C.C. 314 (1930); Western Trunk-Line Class Rates, 173 I.C.C. 637 (1931); Western-Southern Class Rates, 226 I.C.C. 497 (1938); Class Rate Investigation, 1939, 262 I.C.C. 447 (1945).

[55] Class Rate Investigation, 1939, 262 I.C.C. 447, 487 (1945).

mission's decision was appealed to the federal courts, and to many it seemed that a Supreme Court ruling sustaining the Commission was the only thing necessary to complete the triumph of the campaign against sectional discrimination. But Arnall had previously decided to extend the fight to an attack on the rate associations as monopolies and even on the Interstate Commerce Commission for countenancing them. Consequently, the State of Georgia, in 1945, filed a suit, now pending, against the Pennsylvania Railroad Company and others, in which the monopolistic intent of the rate associations in general, and of the Association of American Railroads in particular, was asserted.[56] It would appear from the record that some of the objectives and actions of the AAR were, indeed, designed to exercise a control not altogether voluntary over the railroads of the country. But many people who were in sympathy with Arnall's fight for regional parity disagreed competely with his attack on the rate associations, which in their view performed an indispensable service. Consequently, a contest which had begun on the issue of sectional discrimination now focused upon the merits of rate associations. The new emphasis was particularly confusing in terms of the original issue, because there had previously been times when the heads of the southern rate associations were the most vigorous and effective foes of interterritorial discrimination, and they continued to fight for favorable rates for southern goods in northern markets. What then was the issue that separated them from the Georgia governor? It would seem to be that he was seeking to end discrimination by destroying the differential system and the institutions which had operated it. They, in the belief that regional economic disparities necessitated rate-structure disparities also, were seeking to avoid the discriminatory effect of such disparities by making special competitive rates wherever the rigid application of differential rates would victimize the southern shipper. For the first twenty years of the present century they had been reasonably successful in making such rates, but this was always because they had the cooperation of carriers in official territory. Without such cooperation, the differential rates would apply. And the differential rates could be and have been employed by interests in official territory as a weapon of sectional economic advantage. Upon this point the spokesmen of the Southern Governors' Conference and the Southern Freight Association are agreed.

The complaint that the South, as an economic entity, was victimized by the freight rate structure probably extends back well into the nineteenth century. It can be documented as early as 1900. On June 14 of that year, a freight manager of an alkali company in Michigan, M. R. Bacon by name, testifying before the Industrial Commission, denounced what he called the "prohibitive freight rate to southern seaboard cities." Continuing, he exclaimed:

Take the South for illustration, with its great natural resources. It should be the home of the biggest manufacturing plants in the world. Let the railroads give that country

[56] Leave to file a complaint before the Supreme Court in the case of State of Georgia v. Pennsylvania R.R. was granted March 26, 1945. 324 U. S. 439 (1945). For views of Arnall on the I.C.C., see *Hearings before Senate Committee on Interstate Commerce on H.R. 2536*, 79th Cong., 2nd Sess., 422-426 (1946).

reasonable freight rates, then watch the country prosper. Then see the diversified industries that will gather there. Then note the increased business of the railroads from every point of the compass to her growing manufacturing centers. I can see no effort or disposition on the part of the railroads to bring this about. It can only come from a reasonable and just classification of freight rates, by one traffic association, under the supervision of the Interstate Commerce Commission. . . .[57]

Mr. Bacon did not enlarge upon the problem of territorial discrimination, but developments had already occurred which showed a tendency among the roads to adopt a conscious policy toward the economic growth of different areas. In fact, one of the first indications of such a policy is to be found as early as 1878. At that time the system of through connections was just emerging, and as it did so it automatically precipitated a rivalry between eastern seaboard and middle-western roads seeking a dominant position in supplying the southern market. Traditionally most of the manufactured goods which went South had been drawn from the seaboard, where the first American industry originated; and the staples needed by the South, such as packing-house products, grain products, and the like had been brought from the upper Mississippi and Ohio valleys by way of Cincinnati, Louisville, and St. Louis. This traditional division of functions was now jeopardized by the growth of industry in the West, and by the competitive enterprise of certain eastern interests in seeking to divert west-south traffic, bringing it east and thence south.

Here was a situation potentially likely to create a rate war, and the Southern Railway & Steamship Association was thoroughly committed to preventing all such competitive outbursts. As a result, it entered in 1879 into an agreement, partly formal and partly informal, to fix rates in such a way that eastern industry would have a monopoly of the delivery of manufactured goods, and western producers would have a monopoly of the delivery of staples.[58] Under this agreement, the rates were devised in such a way that manufactured goods moved from Cincinnati to Atlanta at 94 per cent of the rate for the same articles, New York to Atlanta, although on the basis of distance Cincinnati should have paid only 54 per cent as much. But on flour, where

[57] 9 REP. U. S. INDUSTRIAL COMMISSION 75 (1901).

[58] In Freight Bureau v. Cincinnati, N. O. & T. P. Ry., *et al.*, 6 I.C.C. 195, 216, 217 (1894), the I.C.C. reported that from records at the trial it appeared that this arrangement had been made at a convention of all the parties interested, and the "object was disclosed to be 'to protect to the Green Line Roads the business which is peculiar to the northwest, and to the eastern lines, the business peculiar to their territory.' . . ." The agreement then formed was renewed from year to year and in 1892 was expressed in formal terms as follows: "For the mutual protection of the various interests, . . . it is agreed that what are termed western lines shall protect the revenue derived from transportation by what are known as eastern lines, under the rates as fixed by this Association [the Southern Railway and Steamship Association], . . . and that eastern lines shall in like manner protect like revenue of western lines."

Sixteen years later, essentially the same case was brought before the Commission again, the Hepburn Act meanwhile having given the I.C.C. power to determine rates. In this case, Receivers & Shippers Ass'n v. Cincinnati, N. O. & T. P. Ry., 18 I.C.C. 440 (1910), the I.C.C. reexamined the question whether an agreement had ever been made to protect the place of eastern manufacturers in the southern market, and concluded that no such agreement had been made, but that the agreement was solely to divide traffic, regardless of its character, along geographical lines. The Commission admitted that a protection of eastern manufacturers had been proposed, but found no evidence that it had been adopted. This finding is hard to accept after an examination of the evidence cited in the original finding.

Cincinnati was to be encouraged, the rate was only 69 per cent of the New York rate.[59]

In 1892 complainants brought this situation before the Interstate Commerce Commission; in 1894 the Commission ordered the defendant roads to correct their rates on a specified basis, in order to eliminate this discrimination.[60] The Supreme Court, however, refused to uphold this order, on the ground that the Interstate Commerce Commission had no power (at that time) to fix rates.[61] The rates, therefore, remained, and at the beginning of the present century the rate structure still reflected this arrangement.

The territorial agreement of 1879 did not discriminate primarily against the South, though it did prevent the South from chosing freely between an eastern and a western source of supply. But it is a matter of leading significance that the railroads had already recognized that their action could shape the economic destiny of an area, and had demonstrated their power by an arrangement which for more than a quarter of a century controlled the economic relationships between the South and the West. Clearly this was a power of the most basic and vital kind, with a direct impact upon the welfare of every citizen.

In the whole problem of interterritorial relationships, however, there seemed to be one enduring factor of safety: that was the continuing desire of the various and numerous roads to secure traffic, even though at each other's expense. This largely offset the differential between the sections in rate levels, for it meant that the roads would usually make a special rate when one was necessary in order to move traffic between territories. It also offset the grouping of the roads into territorial blocs, for it meant that there was always a road in official territory which would join with the southern carriers in order to make a rate that would permit southern products to reach northern markets. Expressed in another way, this is to say that in practical terms a shipper does not care whether he confronts a rate level which is on the average higher than his competitor's; the average is an abstraction, and what concerns him is his capacity to reach a market at specific rates comparable to his competitor's rates. The action of individual carriers, both South and North, usually gave the southern shipper just such specific rates, and this seemed to provide a safety valve for the whole complex of differentials. Diversities of rate structure can have no applied results except when they impinge at the same point, upon one market or one shipper, and if the factor of difference is eliminated at all such competitive points, then the existence of the differential becomes more a matter of theoretical analysis than of concrete economic reality.

So long as the Sherman Act remained reasonably effective, and so long as numerous, independent railroads vied with one another for traffic, the operation of this safety factor prevented appreciable territorial discrimination. To illustrate specifically

[59] See 9 REP. U. S. INDUSTRIAL COMMISSION 688 (1901), for this data and other testimony on the conspiracy.

[60] Freight Bureau v. Cincinnati, N. O. & T. P. Ry., 6 I.C.C. 195 (1894).

[61] Cincinnati, N. O. & T. P. Ry. v. I.C.C., 162 U. S. 195 (1896).

with a situation which later became famous in railway circles, there was a time when the Louisville & Nashville, sending products into the markets of the upper Middle West, could propose joint rates to a number of roads, all eager for traffic. At Cincinnati, it could work through the Cincinnati, Hamilton & Dayton, the Cleveland, Cincinnati, Chicago & St. Louis, the Chicago, St. Louis & Pittsburgh, or the Cincinnati, Indianapolis & Western. At Louisville, the Ohio & Mississippi, the Jeffersonville, Madison & Indianapolis, the Louisville, New Albany & Chicago, the Chicago, Indianapolis & Louisville, and the Evansville & Terre Haute were available. Here were nine independent roads in official territory, all with an important stake in south-north traffic, and all prepared to join in the making of favorable through rates.[62]

So long as this situation prevailed, southern producers, including manufacturers, secured good competitive rates. As early as 1892 southeastern textile mills received rates to Chicago on a parity with those from Fall River to Chicago.[63] Similarly, southern producers of stoves and ranges for many years enjoyed rates which, although slightly higher, were low enough to enable them to compete with northern stove manufacturers in Ohio, Illinois, and Indiana markets.[64]

All this, however, depended upon the continued independence of the connecting lines. These lines alone held off the potential handicap of higher rate structure and territorial grouping. And beginning about 1920, the connecting lines began to lose their independence.

Almost from the inception of railroading, the process of consolidation had been on the march. At first this extension took the form of the merging of short, separate, connecting lines, in order to create one through connection. Thus the Louisville & Nashville system was created by the consolidation of 125 separate lines, the Southern by the consolidation of 105 lines.[65] In the interest of traffic movements on more than a local scale, this was undoubtedly a desirable trend; but in 1898 a new type of consolidation began to occur, in which the mergers that took place were between competing lines, rather than connecting lines; and as early as 1902 the Industrial Commission estimated that more than half of the railway mileage of the United States was under the control of only six financial interests.[66] After this rapid development, consolidation tended to mark time during the period of Theodore Roosevelt, Taft, and Woodrow Wilson, who were all, of course, hostile to the growth of

[62] Testimony of E. R. Oliver, Feb. 29, 1932, in Docket No. 12,964, Supplement, 2120-2122, Interstate Commerce Commission. I am indebted to Mr. Frank L. Barton for calling my attention to the valuable data in this docket.

[63] *Id.* at 2120.

[64] *Id.* at 2128.

[65] FAIRFAX HARRISON, A HISTORY OF THE LEGAL DEVELOPMENT OF THE RAILROAD SYSTEM OF THE SOUTHERN RAILWAY COMPANY (1901); testimony of A. J. Ribe in *Hearings before Senate Subcommittee on Interstate Commerce on S. Res. 99*, 76th Cong., 1st Sess. 380 (1939).

[66] 19 REP. U. S. INDUSTRIAL COMMISSION 307-308 (1902). The railroads of the South were, of course, undergoing a similar consolidation, and by 1925 the I.C.C. stated that there were but four major systems—the Southern Railway System, the Louisville & Nashville-Atlantic Coast Line System, the Seaboard Air Line System, and the Illinois Central System—which dominated the railway network of the South. 100 I.C.C. 513, 525 n. (1925).

monopoly. Beginning with the First World War, however, the emphasis changed, and under the Transportation Act of 1920 pooling, consolidation, and other collectivist practices received explicit sanction. As a result, the small roads, including those connecting lines which had joined with southern railroads in carrying southern goods north from the Potomac or the Ohio, began to fall under the control of the great trunk lines, such as the Erie, the Pennsylvania, the New York Central, and the Baltimore & Ohio. Thus, by 1929, of the nine independent connecting lines which had once linked the Louisville & Nashville with northern markets, one had passed into the hands of the New York Central, one to the Chesapeake & Ohio, two to the Pennsylvania, and three to the Baltimore & Ohio. An eighth had been absorbed by the ninth, the Chicago, Indianapolis & Louisville, or Monon, as it is usually called. This ninth, as a subsidiary of the Southern and the Louisville & Nashville, alone remained free from the domination of the trunk-line roads.[67]

The strategic importance of the Monon now illustrated the precarious nature of southern access to northern markets, for repeatedly it was this road alone which prevented gross territorial discrimination by other official roads. The trunk lines which had taken over the eight connecting lines were concerned primarily with long hauls of east-west traffic in their own area, rather than short hauls north from the Ohio. Consequently, when southern roads in 1921 sought to secure a market for sugar imported at Savannah by proposing to the Central Freight Association the establishment of an interterritorial rate competitive with the official territory rate, the northern group rejected the proposal. The Monon thereupon announced that it would independently agree to a joint rate with southern lines, and when it did so the other roads in official territory also complied, since, if the traffic was going to move at all, they desired a share. But they had sought to stop it completely. Similarly in 1928, official lines in the Illinois Freight Assocation refused a proposal by southern lines to establish competitive rates for paper from Alabama, and again the independent action of the Monon caused them to make such rates against their expressed will.[68]

In other cases the official lines were successful in withholding their compliance, and at times they were able to use the fourth section of the Interstate Commerce Act as a weapon. This section, which prohibits lower rates for a long haul than for a shorter haul included within the long haul, would, unless the Commission granted relief, prevent a competitive rate to a point in official territory if that rate were lower than the rate to an intervening point in southern territory. In other words, it would prevent southern carriers from maintaining a higher rate level in the South while by-passing that level when they desired to compete in northern markets, and in this sense it placed the southern differential as a weapon in the hands of northern railroads bent on monopolizing northern markets for their own shippers. To illustrate: carriers in official territory had long joined

[67] Testimony of E. R. Oliver, I.C.C. Docket No. 12,964, Supplement, 2120-2122.
[68] *Id.* at 2140.

southern carriers in special joint rates for cotton piece goods; but when an order was issued, September 9, 1931, for a review of these rates, the leading official territory lines at once "declined longer to participate in competitive rates on this traffic from points in Southern territory to destinations in Official territory," and they proceeded to file a petition seeking permission to suspend such competitive rates.[69] Somewhat the same thing happened in connection with iron and steel articles, so that Mr. E. R. Oliver, vice-president in charge of traffic of the Southern Railway, declared, "the principal Official territory lines . . . have seized upon the opportunity [of the fourth section] to wipe out competitive rate adjustments of long standing applying on manufactured products from Southern territory to Official territory."[70]

In 1932, the Baltimore & Ohio took steps which convinced the southern roads that it was about to attempt to seize control of the Monon under certain provisions of the Transportation Act of 1920. This stimulated a vigorous response, and in hearings before the Interstate Commerce Commission in 1932 spokesmen of the southern roads expressed themselves with unusual candor about the policy of official lines. Joseph G. Kerr, of the Louisville & Nashville, was questioned by an examiner who asked:

I understand you to say that it had been for a number of years past the fixed policy of these four railroads [Erie, Pennsylvania, New York Central, and Baltimore & Ohio] . . . who are seeking the control of all the railroads north of the Ohio and Potomac rivers . . . to prevent as far as they could the movement of traffic from the South generally into the Northern territory on competitive terms. Is that correct?

To this, Mr. Kerr responded: "On competitive terms wherein it in any way affects the east and west traffic."[71] E. R. Oliver, vice-president of the Southern Railway, was even more forthright in his statement. He declared:

The Southern carriers have always followed the policy of maintaining competitive rates from the South into Official territory in line with the rate level prevailing within Official territory in order that manufacturers in Southern territory can reach the large markets in the North and East in competition with manufacturers located North of the Ohio and Potomac rivers. The Southern carriers were able, over a long period of years to carry out this policy until the end of Federal control on February 29, 1920. . . .

The absorption of the [independent] lines in this Northern territory by the larger systems whose chief interest is in traffic moving eastbound and westbound has changed the whole complexion of this situation so that the north-and-south lines thus controlled

[69] *Id.* at 2137-2138.

[70] *Id.* at 2124-2126. A number of cases which illustrate the attempts of northern roads to cancel competitive rates or to prevent their establishment are Auburn Automobile Co. v. Pennsylvania R.R., 151 I.C.C. 120 (1929); Hosiery from Southern Points, 156 I.C.C. 117 (1929); Export and Import Rates, 169 I.C.C. 13 (1930); Stoves, Ranges, Boilers, etc., 169 I.C.C. 169 (1930); and Iron and Steel Products from the South, 176 I.C.C. 345, 352 (1931). In the last of these cases the Commission declared, "The evidence upon this record leaves no doubt that the southern manufacturers would have serious, if not insurmountable difficulty in competing with the northern manufacturers in the destination territory if the proposed rates became effective. Since the demand in southern territory for the articles manufactured by them is much less than they can supply, it must be that if their market in the north were thus seriously restricted, the very existence of some of these southern manufacturers would be threatened."

[71] I.C.C. Docket No. 12,964, Supplement, 2202.

no longer agree to establish or continue rates on Southern manufactures into this Northern territory in competition with rates enjoyed by manufacturers in Official territory directly served by the east-and-west lines.

The new policy of these connections is to build a rate wall at the Ohio and Potomac rivers which will prevent or greatly curtail the movement of Southern products into Official territory.[72]

Although this situation was illustrated especially well by the developments at the Ohio River crossings, it was by no means confined to that area. The principal connections of the southern lines at the Virginia gateways were also, in a competitive sense, blocked, and the Baltimore & Ohio and the Pennsylvania opposed "every effort of the Southern lines to establish or maintain rates from the South into Official territory in line with the rates within Official territory."[73] From the standpoint of traffic movement, this did not seriously obstruct northbound shipments, for the southern roads could and did rely heavily on water-borne connections north of Norfolk. But in this utilization of steamships in the East, as in their utilization of the Monon line in the West, the southern roads were placed in the insecure position of relying upon a limited group of somewhat exceptional connections, rather than upon a broad basis of equitable interterritorial rates.

It was at about this time that the Interstate Commerce Commission announced a conclusion which might well have astonished those who looked upon the Commission as the effective guardian of justice in the American rate system. In the case of *Alabama v. New York Central Railroad* it declared:

> The contention that the Northern carriers, which participate in the interterritorial rates, do not control the rates within the North appears to be contrary to the facts. . . . We are persuaded that the Northern carriers as a group actually do effectively control the rates within the North and also the northbound interterritorial rates except to points on and west of the Monon line.[74]

At the end of the decade of the Twenties, therefore, the freedom of southern producers to sell in northern markets was threatened as never before. The disappearance of independent north-south connecting lines removed the possibility of arranging special joint rates into official territory. This forced the South to face, for the first time, the intersectional consequences of the differential in rate levels and the demarcation of territories. Northern railroads freely utilized these factors to monopolize their own markets for their own shippers, and the Interstate Commerce Commission admitted that these northern roads were in full control of the situation.

It was already a grave state of affairs, but the decade of the Thirties brought a number of new developments which increased its gravity. First of all, this era brought the Great Depression, which immeasurably sharpened the incentive of all business enterprises to seize upon any economic advantage, any means of procuring or of retaining business. This meant that northern carriers and shippers would

[72] *Id.* at 2119-2124.
[73] *Id.* at 2150.
[74] 235 I.C.C. 255, 329 (1939).

employ to the fullest any sectional advantage which inhered in the rate structure. Second, it brought to a climax a drive by the South to capture a greater part of the nation's industry. In doing this, southern promoters, in some cases with the cooperation of their state governments, publicized fully every advantage which the South could offer. Southern wages were low because living costs were low and labor was not unionized.[75] Overhead costs of operation were lighter because taxes were not as heavy as in metropolitan areas and, at times, exemption from taxes was granted for a term of years. Climatic advantages permitted more continuous operation in some types of industry than was possible in the rigors of a northern winter. In short, almost every advantage seemed to lie with the South, and the migration of industry from New England reached proportions that have cast a lasting blight over some of the oldest industrial areas in the country. It was not surprising, therefore, that northern industry began to fight back. To offset the wage differential, many an eastern industrialist who would never have done so otherwise gave his support to a uniform national wages and hours law, and the enactment of that measure assumed a distinctively sectional character.[76] One of the few indubitable advantages which the North still possessed was the favorable rate structure, and the utilization of every such advantage became increasingly imperative.

A third factor which contributed to bringing the rate question into a new phase was the virtual suspension of the antitrust laws during the first years of the New Deal. Collective action in industry had made great strides during the Twenties, but the climax came with the adoption of the National Industrial Recovery Act in 1933, with its avowed purpose to promote "the organization of industry for the purpose of cooperative action among trade groups" and its suspension of the antitrust laws in so far as they conflicted with compliance with the Act.[77] President Roosevelt had specifically indicated that he regarded collective action in the railway field as valid, for he had declared at Salt Lake City on September 17, 1932, "I believe the policy of enforced competition between railroads can be carried to unnecessary lengths. . . . We have . . . frequently required them to compete unreasonably with each other." The adoption of the Emergency Railroad Transportation Act of 1933[78] seemed to lend further sanction to the idea of group action, and this impression was confirmed when the Federal Coordinator of Transportation, appointed under the Act, urged the roads to form "a more perfect union."[79]

Accordingly, the railroads began to strengthen the agencies in which they were associated. The Pennsylvania Railroad acted as the spearhead of this movement,

[75] The specific relationship of the intersectional wage differential and the intersectional rate differential has been recognized by Governor Arnall. See his testimony in *Hearings before the Senate Committee on Interstate Commerce on H. R. 2536*, 79th Cong., 1st Sess. 417-418 (1945).

[76] Speaking of the Fair Labor Standards Act, Carl B. Swisher declares, "It was believed that the proposed statute would curtail the incipient industrial development in the South and that it was intended to do so." AMERICAN CONSTITUTIONAL DEVELOPMENT 910 (1943).

[77] 48 STAT. 195, 198 (1933).

[78] 48 STAT. 211 (1933).

[79] Testimony of R. V. Fletcher, Association of American Railroads, in *Hearings before the Senate Committee on Interstate Commerce on H. R. 2536*, 79th Cong., 2nd Sess. 1376 (1946).

and at a meeting, now famous, at the Metropolitan Club on November 14, 1933, a group of the nation's leading capitalists, industrialists, and railroad executives planned to reorganize the innocuous old American Railway Association into a new and potent successor.[80] This successor emerged about a year later as the Association of American Railroads.

Whatever the objectives of the new association were, they did not relate primarily to interregional rate controls. Eastern railroads had more to fear from pipe-line competition, or from motor-truck competition, than from their southern associates. Consequently, the major part of their activity was directed to other matters. But though the association was careful, in deference to the antitrust laws, to avoid abridging the legal right of its members to independent action, it was certainly somewhat monopolistic in spirit. It sought to prevent disputes between carriers from going to the Interstate Commerce Commission, and to this end it set up an elaborate mechanism for arbitration;[81] it adopted a resolution that "no further request for suspension of tariff publications of one group of lines will be filed with the Interstate Commerce Commission by other lines, unless there has first been a conference of representatives of both parties with the officers of this organization."[82] When one of the member lines showed a tendency to disregard the policies of the association, J. J. Pelley, president of the association, reminded the offender of the possibility of "extensive retaliatory developments."[83] All along the line there was a tendency to centralize action in a limited number of hands: in southern territory, for instance, a new Traffic Executive Association for southern territory was established, with authority to handle matters of concern to all southern roads, and the Southern Freight Association acknowledged this authority; but only eleven members belonged to the Executive Association, and thus small southern lines were faced with the dilemma of accepting this authority in which they were not represented, or of withdrawing from the Southern Freight Association, which had been made the instrument of their submission.[84]

In terms of interterritorial relationships, the principal threat to southern shippers and carriers lay in the development of a policy which would avoid carrying questions to the Interstate Commerce Commission, and in the creation of an array of interterritorial committees in which the representation was arranged in such a way as to assure the dominating influence of official roads. Of this there were two outstanding examples. The first was the Joint Conference of Central Freight Association, Trunk Line Association, and New England Freight Association. The func-

[80] For transcript of proceedings of this meeting, see the exhibits in the Plaintiff's Trial Brief, Part II, 18-21, in the case of Georgia v. Pennsylvania R.R., in the Supreme Court of the United States, October Term, 1945, No. 11 Original.

[81] See Articles of Organization of this association in *Hearings before the Senate Committee on Interstate Commerce on H. R. 2536*, 79th Cong., 2nd Sess. 1548-1555 (1946).

[82] Resolution, May 5, 1935, in Plaintiff's Trial Brief, cited *supra*, note 80, at 70-71.

[83] Letter of Pelley, April 16, 1936, *id.* at 58-59.

[84] The plan of organization of the Traffic Executive Association and the reorganized articles of the Southern Freight Association, recognizing the authority of the new body, are in *id.* at 145-164.

tion of this conference of the three sub-regional groups within official territory was to consider proposals for rates, lower than regular class rates, from other territories. This meant, in effect, that if a southern carrier wished to arrange a special rate it would first have to submit the matter to the Southern Freight Association, and at the same time to the three official territory associations, any one of which could reject it, even though the rate under consideration did not extend to the sub-region which exercised the right of rejection. Upon an appeal, the matter would go to the Joint Conference of eastern territory lines, where a three-fourths majority within each of at least two of the three eastern associations would be required to sustain the appeal. Under this plan, a rate from the South might easily be blocked by representatives of a sub-region in the East to which the rate was not applicable.[85] Legally, of course, individual roads still retained a right of independent action in agreeing upon and filing joint rates, but clearly there was heavy pressure to prevent this.

The second of the important interterritorial groups was the Joint Conference of Contact Committees, constituted of representatives of the seven principal rate-making associations, of which one is southern, one southwestern, one western, and four are within official territory. This, of course, conferred a potential majority upon official territory over all other territories combined, and it has been asserted that this advantage was fully utilized by the official representatives' practice of voting as a unit.[86]

Railway representatives, denying the significance of these arrangements, have made vigorous assertion of the frequency with which the individual roads continue to file independent rates,[87] but it does not appear that many of these are joint rates crossing the interterritorial barrier.

Nor does it appear that, so long as the great trunk lines dominate official territory, the situation would be altered appreciably by a dissolution of the new interterritorial agencies, for the full effect of the sectional barrier had made itself felt before these agencies were constituted. In this sense, the State of Georgia's case does not reach to the heart of the problem, though it does deal with an important aspect.

It is hardly to be supposed that the Supreme Court's rulings, either in its review of the *Class Rate Decision* of 1945[88] or in its disposition of the case of *Georgia v.*

[85] Rules of procedure of these conferences, *id.* at 120-122.

[86] Rules of procedure of this conference, *id.* at 171-174. See also, at 174, memorandum of S. B. Mitchell of Southern Freight Association, as follows: "As you know, the Official Classification lines, i.e., C.F.A., E.T.U., N.E., and I.F.A. vote separately in the Joint Conference of Contact Committees and their votes are nearly always a unit Having four votes, necessarily they have an advantage and can often control the action of the Joint Conference of Contact Committees. Our only hope in getting a fair deal with our interterritorial proposals that go to the Joint Conference for disposition is through the Illinois Freight Committee. Until the recent past that Committee required only one negative vote to defeat a proposition, therefore, to illustrate, a proposal from the South to Chicago, while favored by a majority of the Illinois lines, their vote would be in the negative if one east to west line voted in the negative."

[87] Joseph G. Kerr has stated that the members of the Southern Freight Association filed 19,000 rates directly with the I.C.C. and without approval by the Freight Association in the years 1933 and 1934. He concedes that this was an abnormal time, but also states that in the three years ending in 1943, the Southern Railway filed 152 separate actions, and the Seaboard filed 78. *Hearings before the Senate Committee on Interstate Commerce on H. R. 2536*, 79th Cong., 2nd Sess., 1290-1293 (1946).

[88] 262 I.C.C. 447 (1935). [This decision of the Commission was upheld by the Supreme Court on May 12, 1947. See the FOREWORD to this symposium. Ed.]

Pennsylvania Railroad, will provide a final solution for a problem of such complexity and long standing as that of regional rate differentials. Arrangements which have stood since the heyday of the cotton economy and since the Ohio and Mississippi were unbridged are not to be supplanted easily or at once. But, however these cases may be decided, and however the decisions may be applied in establishing a new system, the concurrent importance of the two cases at the present time illustrates the continuing parallelism of the two factors which alone have operated or may operate to prevent differential rates from being discriminatory rates. One of these factors is competition among carriers, which has maintained the access of southern goods to northern markets by special rates during a long period when the Interstate Commerce Commission lacked the power or the impulse to modify regional differentials. The other is public authority, represented by the Commission, which was until very recently content to play a more passive role than most Americans realized in accepting the rate patterns as they had evolved, or as the carriers had fixed them. Because of the first of these factors the South has never been subjected to such an economic blockade as some publicists have implied; though the trunk lines have at times sought to utilize the differentials as a tariff wall, southern goods have escaped decisive or permanent exclusion. But in the absence of small, independent carriers, the basis for competition narrows increasingly. As it does so, the responsibility of public authority increases. Readiness to meet the responsibility has been indicated by the *Class Rate Decision* of 1945. By any measure, this decision would seem to mark a turning point in the history of regional differentials, for whether the Commission attempts a solution by the gradual elimination of all territories, or by the imposition of equitable rates between them, it appears that the transition has been made from a system of differentials tempered by competition to one of differentials tempered or eliminated by active public regulation.

THE RATE-MAKING PROCESS

WENDELL BERGE*

I

INTRODUCTION

Since 1943 a great deal has been said and written concerning the function of rate bureaus and conferences in the making of rates to be charged for common carrier transportation service. Defenders of the rate bureaus have frequently maintained that the present system of rate conferences must be preserved or chaos and confusion will reign in the making of transportation rates.

These claims are made in response to charges set forth in suits by the Federal Government and the State of Georgia that railroad rate bureaus were being operated in contravention of the Sherman Act.[1] In the Seventy-eighth, Seventy-ninth, and Eightieth Congresses bills were introduced to exempt interstate carriers regulated by the Interstate Commerce Commission from the application of the antitrust laws.[2] On occasion the Department of Justice has been vigorously criticized for bringing a suit to enforce the antitrust laws in an area in which it is urged that the Interstate Commerce Commission should have exclusive jurisdiction. The assertion is made that interference with the present method of operation of rate bureaus and conferences would be disastrous because the rate-bureau procedure is absolutely necessary and cannot be changed if the carriers are to comply with the Interstate Commerce Act.

The purpose of this paper is to examine the rate-making process as carried on through the rate-bureau mechanism to ascertain whether the activities are necessary for compliance with the Interstate Commerce Act, or whether such activities could be altered to meet the requirements of the antitrust laws without handicapping the carriers in their efforts to comply with the Interstate Commerce Act. The process is termed private rate-making, as opposed to the regulatory rate-making provided for by statute to be carried on by the Interstate Commerce Commission. While much of what is written here applies to rate bureaus for other forms of transportation, railroad rate bureaus will be the topic for discussion and analysis. To attempt to deal with

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[1] United States v. The Association of American Railroads, The Western Association of Railway Executives, *et al.*, 4 F. R. D. 510 (D. C. Nebr. 1945); State of Georgia v. The Pennsylvania Railroad Company, *et al.*, Supreme Court of the United States, October Term, 1945, No. 11—Original (324 U. S. 439 (1945)).

[2] S. 942, 78th Cong., 1st Sess. (1943); H. R. 2536, 79th Cong., 2nd Sess. (1946); S. 110 and H. R. 221, 80th Cong., 1st Sess. (1947).

the rate-making activities of bureaus in each form of transportation would entail a discussion too lengthy to be practicable. The fundamental issues are the same and can be covered by an examination of rail bureaus. The analysis will take into account the operating regional rate bureaus as well as the appellate machinery superimposed on them and forming an integral part of the private rate-making procedure.

II

EARLY COURT DECISIONS ON RATE BUREAUS AND THE SHERMAN ACT, AND SUBSEQUENT ORGANIZATION OF RATE BUREAUS

Before taking up the private rate-making process a brief résumé of the experience of rate bureaus under the Sherman Act will be given, followed by an account of the organization of the present private rate-making machinery.

In 1889 many of the railroads operating west of the Mississippi River entered into an organization known as the Trans-Missouri Freight Association. The preamble to its articles of agreement[3] announced that:

> For the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, the subscribers do hereby form an association to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions. . . .

Rates were established by a committee appointed pursuant to the agreement and any member railroad violating the established schedule of rates was subject to a penalty. A member railroad could withdraw from the association on giving thirty days' notice, but while a member it was bound to charge the rates fixed, under a penalty for not doing so.

The Sherman Act became law in 1890. In 1892 action was brought by the Federal Government against the association alleging a combination for the purpose of fixing rates, rules, and regulations for freight traffic. In 1897 the Supreme Court held the Trans-Missouri Freight Association in violation of the Sherman Act and a decree was entered dissolving the association and perpetually enjoining further operation of the combination.[4]

The year 1896 saw the formation of the Joint Traffic Association, composed of railroads operating between Chicago and the eastern seaboard. It was agreed that the association should have jurisdiction to fix rates and fares and from time to time to change them. Each railroad, however, reserved the right to change the rates applicable over its own lines. In the same year the Government instituted proceedings, again charging a combination for the purpose of fixing rates, rules, and regulations for all rail traffic. This combination was declared unlawful in 1898 by the Supreme Court and a decree was entered perpetually enjoining the practices carried on by the association.[5]

[3] The articles of agreement are quoted and summarized in United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 292 *et seq.* (1897).

[4] United States v. Trans-Missouri Freight Association, 166 U. S. 290 (1897).

[5] United States v. Joint Traffic Association, 171 U. S. 505 (1898).

Between 1898 and the early 1930's the railroads refrained from organizing any further combination openly to fix rates and fares or to establish rules and regulations. A number of national organizations in the nature of trade associations were maintained for various purposes. Among the most important of these were:

1. The American Railway Association, which was a loose national association having as members practically all railroads in the United States as well as railroads in Canada and Mexico. It was organized in 1891 for the purpose of handling certain questions of general interest arising for the most part in railroad operating departments. From the time of its organization until the decision of the Supreme Court in the *Trans-Missouri* case in 1897 it had jurisdiction over rates and charges; but after that decision its by-laws expressly prohibited it from taking jurisdiction over rates and charges. One of its most important early functions was to establish principles for the handling of the cars of one railroad by another. It also dealt with problems arising in connection with such matters as demurrage and standards applicable to equipment. Subsequently, it fostered research and experimentation in railroad transportation. It functioned largely through committees composed of railroad men expert in the specific problems with which it dealt. These committees made a number of valuable reports that were influential in standardizing methods of operation. This assoication was also responsible for the publication of periodic reports concerning condition of rolling stock, the amount of car loading, and similar statistical and trade-reporting activities characteristic of trade associations. It had a loose organization directed by a board chosen annually from among the presidents and vice-presidents of the member roads.

2. The Bureau of Railway Economics, which was an independent organization supported by the railroads, managed by a director, and having for its function the making of economic and statistical studies for use by the railroads in rate cases, valuation cases, public relations work, and the like. It was entirely independent of all other railroad trade associations and organizations.

3. The Railway Accounting Officers' Association, which consisted of accounting representatives of the principal railroads of the country working under the direction of an executive committee consisting of a comparatively small number of chief railroad accounting officers. It maintained a permanent secretary at Washington, D. C., for a great many years and studied methods for improving railroad accounting practices and for bringing them as far as possible to a uniform basis.

4. The Treasurers' Association, which was similar in organization to the Railway Accounting Officers' Association except that it did not maintain a permanent office nor a paid secretary. Its work was carried on through correspondence and through annual meetings and dealt with the treasury problems of the railroads.

5. The Association of Railway Executives, which was established in 1914 to deal with matters of common interest to all the railroads. Originally its jurisdiction was very broad and included rate matters, but subsequently the articles of organization were amended to prohibit the association from considering rate cases, traffic prob-

lems, propaganda, advertising, and labor relations. Thereafter the association dealt primarily with federal legislation and general questions of policy relating to legislation. It was a loose organization having an executive committee, which in later years became almost obsolete, but no real directing body save an advisory committee of about fifteen members who met from time to time at the call of the chairman. It maintained a permanent office in Washington with a small staff consisting of the chairman, who devoted only part of his time to the work, a general counsel, a general solicitor, a secretary, a treasurer, and other lesser officers. The general counsel devoted all of his time to the work of the association and was its most important officer.[6]

In addition to these organizations the railroads maintained rate bureaus and conferences—operating organizations—in the various rate territories. Their jurisdiction ranged from single states or smaller units to entire sections of the country, such as the Southeast. It is quite probable that the activities of these rate bureaus resulted in the concerted fixing of freight rates in violation of the Sherman Act, but there was no organization to coordinate the activities of these rate conferences on a national scale until 1934, when the Association of American Railroads was formed.

There had been formed in 1932, however, among the railroads in the area west of the Mississippi River, the "Commissioner Plan, Western District," under the so-called Western Agreement administered by an officer known as the Western Commissioner. According to the plan, which was superimposed on the rate bureaus operating in the West, the Western Commissioner considered controversies arising when a railroad party to the agreement desired to inaugurate better service, improved facilities, or lower rates, and any other party to the agreement protested against such changes. Under the terms of the Western Agreement the changes could not be put into effect until after notification to all parties to the agreement, and, in case of protest and reference of the matter to the commissioner, until after formulation of a proposed solution of the controversy by the Western Commissioner. In the event that the commissioner's proposed solution was not accepted, the matter was referred to a committee of directors, composed of representatives of banking and financial interests.

Mr. W. A. Harriman, one of the organizers of the plan, has pointed out that its purpose was to subject western railway management decisions concerning rates and practices to review by the board of directors:

> Railroad directors are charged with a duty of directing the affairs of their railroads. They do not run the railroads—that is the duty of management. But the directors do have the duty of formulating policies and of supervising the activities of management with respect thereto. Policies cannot be formulated without knowledge and management cannot be supervised without understanding.
>
> The directors already supervised expenditures by management to a very close degree and yet large sums could be lost in unfortunate traffic experiments or improper traffic

[6] State of Georgia v. The Pennsylvania Railroad Co., *et al.*, cited *supra*, note 1, Plaintiff's Trial Brief, Part I, 11-13.

policies without the matter coming to the notice of directors until after the damage was done. With the onset of depression conditions, directors made closer and closer scrutinies of expenditures, but were still powerless to exercise any effective supervision over policies of rates and practices involving substantial sums.

The directors' committee created by the Commissioner plan was designed to correct this situation. To them the Commissioner reported many of the problems which came to him—so as to give the directors the benefit of his investigations and research. All problems in which the recommendations of the Commissioner were not adopted came to the committee. . . . In this committee of directors all personality, prejudice, and suspicion of traffic officers was left behind, the necessity of management to uphold a subordinate did not exist, because no president, vice president, or trustee was eligible for membership. . . . The committee was merely a forum for consideration and discussion, for the impact and grinding of ideas.[7]

One example will show the potency of action taken by the committee of directors. The Western Commissioner's authority was invoked when the Chicago Great Western announced its intention to assert independent action and publish reduced rates on packinghouse products. After hearings the commissioner concluded that the reductions should not be made effective. This conclusion was unacceptable to the Great Western; so the commissioner promptly reported that railroad's insubordination to the committee of directors. A resolution was immediately adopted by the committee calling upon the Great Western to reconsider and recede from its proposed action. Shortly thereafter President Joyce of this recalcitrant railroad was summoned to New York to discuss with a group of the committee of directors his declination of the commissioner's decision. Later, in his annual summary, the Western Commissioner reported:[8]

. . . As a result of the conference with the subcommittee of the Committee of Directors, the Chicago Great Western Railroad Company indicated a willingness to abide by my conclusions under the Commissioner Agreement, and the proposal was withdrawn.

With the experience of effective action of this nature under the Western Commissioner Plan as a background, the Association of American Railroads was formed. In 1933 preliminary discussions among banking and investment groups led to formation of a steering committee of railroad directors (subsequently known as the Committee of Nine) to represent stock-holding and investment interests in creating a national organization for the collective control of railroad affairs, including, of course, freight rates.[9]

Concerning the need for unified authoritative control over rates, one of those interested in forming a national organization wrote:[10]

[7] *Hearings before the Senate Interstate Commerce Committee on S. 942*, 78th Cong., 1st Sess. 974-975 (1943).

[8] United States v. Association of American Railroads, cited *supra*, note 1, Plaintiff's Trial Brief, Part II, 419.

[9] See *Hearings before a Subcommitte of the Senate Committee on Interstate Commerce on S. Res. 71 of the 74th Cong.*, 75th Cong., 2nd Sess., Part 23, 10051 (1938).

[10] United States v. Association of American Railroads, cited *supra*, note 1, Plaintiff's Trial Brief, Part II, 41-42.

The necessity for a strong effective committee or organization representing the railroad industry as a whole as opposed to the interests of individual railroads is emphasized at the present time in connection with the weakness the railroads are showing in protecting their rate structure. . . .

General Atterbury of the Pennsylvania Railroad took the lead in preparing a plan of organization to embrace all the railroads. The conception evolved by the Pennsylvania group was a direct and simple one. The proposal was that all existing trade associations and rate bureaus be merged into a single, integrated, pyramid-shaped structure with authority residing in a national organization located at the apex. Or, as it was expressed by Mr. R. V. Fletcher, Vice-President of the Association of American Railroads:

. . . In the spring of 1933, I found . . . a number of independent organizations which it seemed to me might very profitably, in the interest of economy as well as of efficiency, be consolidated into a single organization. . . .

It always seemed to me . . . it would be advisable to consolidate all these various organizations into one. . . . *And they were consolidated together under one head* [Association of American Railroads], under the direction and control of the board of directors.[11]

Mr. Fletcher gave as a principal reason for the organization of the Association of American Railroads the recommendation by the Federal Coordinator of Transportation of the importance of a "more perfect union" among the railroads.[12]

In an effort to attain the authority recognized as essential to the success of such an arrangement, early drafts of the plan for an authoritative national association contained a provision for penalizing any member who failed to follow the recommendation of the national organization or who refused to submit to compulsory arbitration of controversial questions. More judicious counsels prevailed, because it was realized that an express statement of compulsion was unnecessary and might attract undesirable attention. This was clearly indicated in an exchange of documents between J. L. Eysmans, assistant to General Atterbury, and John J. Pelley, who later became President of the Association of American Railroads. Pelley wrote to the Pennsylvania:

(2) I favor compulsory arbitration. Should like to see the plan changed so as to obligate a railroad joining the Institute to abide by the decisions of the majority of the board of directors, or arbitrate and abide by the decisions of the board of arbitration, with the understanding that the decisions of the board become effective immediately, adjustments, if any, to be made when arbitration is concluded. For fear that some roads may not be willing to obligate themselves for an indefinite period, the agreement might be limited to five years.[13]

Mr. Eysmans replied:

In regard to your note to the General about the reorganization: . . . As to No. 2: I think you must read Section 6(g) and 21(e) together to find the "teeth." If any road

[11] *Hearings before the Senate Committee on Interstate Commerce on H. R. 2536*, 79th Cong., 2nd Sess. 1371-1372 (1946). (Emphasis supplied.)

[12] *Id.* at 1372.

[13] Record before the Special Master, State of Georgia v. The Pennsylvania Railroad, *et al.*, No. 11—Original, Supreme Court of the United States, October Term, 1945, State Exhibit 22. The proposed organization was generally referred to as "the Institute."

does not carry along with arbitration and the decisions of the Board, it must get out of the Institute, and as there will no longer be any A. R. A. you can see it is practically impossible for a railroad to withdraw.

This change was made because Judge Fletcher believed it would avoid the danger of having the whole plan attacked as being a violation of the antitrust laws. This danger would be increased by a penalty clause of this kind, which would require the railroads to agree in advance to the imposition of fines and penalties. Furthermore, generally, the courts hold arbitration clauses cannot be enforced by legal proceedings since the courts are jealous of their jurisdiction and will not allow people to resort to their remedies at law. The Judge has felt that since the penalty of disregarding a decision of the Institute, and refusal to submit to arbitration is expulsion from the Institute, this would be sufficient punishment without incorporating in the plan a provision which may be difficult to enforce, and which would look bad if the United States Government should challenge the whole set-up as being possibly in conflict with the antitrust laws.[14]

Even with the penalty clause omitted, the "teeth" in the form of compulsory arbitration caused some of the planners serious apprehension of public dissatisfaction and complaint. Mr. Fletcher, at the time Chief Counsel of the Association of Railway Executives, and one who was very active in organizing the Association of American Railroads, found it difficult to believe that a railroad which had agreed to all the terms of the plan would thereafter in violation of its agreement refuse to conform thereto or to arbitrate. Any railroad guilty of such a breach of "a gentleman's agreement" would, in Fletcher's opinion, "simply be outside the pale."[15] Mr. Fletcher's advice prevailed and the plan in final form contained merely a statement that the members should recognize that policies announced by the new Association of American Railroads would be authoritative and would be supported.

On September 21, 1934, the plan was approved by a joint meeting of the member lines of the American Railway Association and the Association of Railway Executives. The cooperation of railroad directors was assured the association through direct liaison with the committee representing the financial interests, which stood ready to exert its influence and the influence of its associates among directors and substantial stockholders to compel the subordination of interests of individual railroads to the dictates of group interest.

President Williamson of the New York Central expected that the activities of the association would produce some unhappiness, but, as he observed to President Atterbury of the Pennsylvania, all must expect in the common good "to be pinched in places where it will hurt."[16]

The smaller roads were somewhat dubious of the mutual benefits to flow from the pinching. At least two small roads, the Bangor & Aroostook and the Wheeling & Lake Erie, sought to join with specific provisions reserving a veto power over association decisions affecting their respective roads. Even this limited retention of individual initiative was rejected by the association, and Vice-President Cleveland

[14] *Id.*, State Exhibit 23. The abbreviation "A. R. A." stands for American Railway Association.
[15] *Id.*, State Exhibit 27.
[16] *Id.*, State Exhibit 33.

sought to reassure the doubtful by assuring them that as far as possible his policy would be "a cooperative one through leadership rather than through coercion."[17] Significantly, he did not disavow the power to coerce in the event his leadership should prove ineffectual. Ultimately, of course, the very power that produced their fears compelled the small roads to join.

There followed a brief period of felicitations on the part of those forming the new association, with the banking interests claiming a large measure of credit and stating to Mr. Pelley that, despite the evident spirit of cooperation, cases might well arise where divergent interests might make difficult of accomplishment measures for "the benefit of the industry as a whole," and that the interests of the individual roads must be subordinated to those of the whole industry. For effectuation of such a policy, Mr. Pelley was assured of "support" and "assistance" of the financial groups represented on the committee.[18]

The background and purpose of the organization of the Association of American Railroads is given in order that it may be seen that the private rate-making function is merged into a single integrated structure resting at the bottom upon the regional bureaus and their committees and bound together at the top by an association having the authority and power to enforce its mandates by economic discipline of its members. Mr. Pelley has admitted that the Association of American Railroads exercises control over matters in the rate bureaus beneath it in the private rate-making structure.[19]

The Association of American Railroads has gone so far as to exercise its power over rates even before the presentation of the request for a reduction to the railroads originating the traffic. In 1938, Mr. Cleveland, Vice-President-Traffic, upon learning that the Secretary of Agriculture contemplated asking for a reduction in citrus fruit rates in order to increase consumption of the large production of that fall, wrote southern and western railroads that "no commitments should be made by any single origin group but that when requests are received they should be handled collectively. . . ."[20]

The result was that the matter was handled from the headquarters of the Association of American Railroads in Washington. There was no reduction in citrus fruit rates.

III

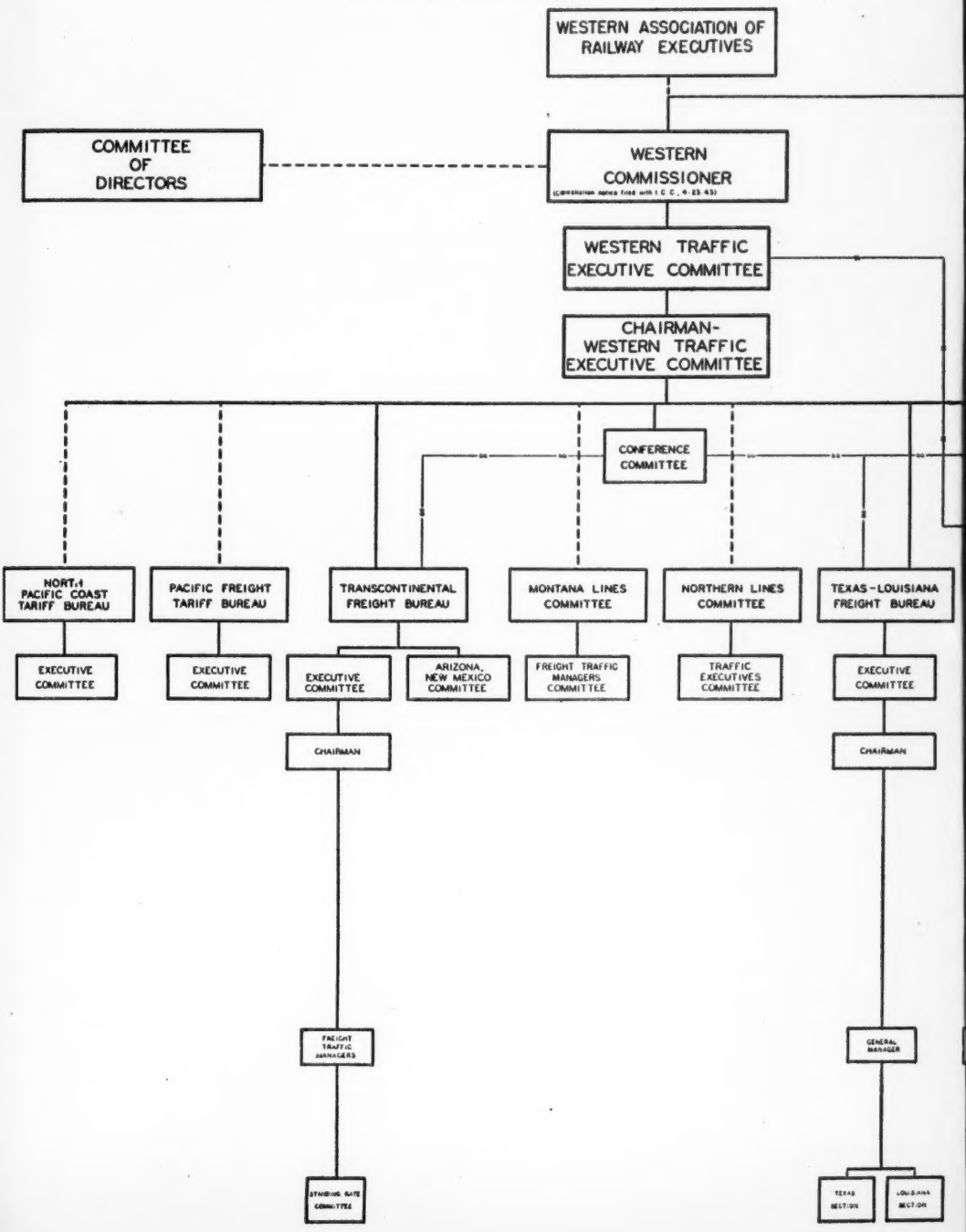
REGIONAL ORGANIZATION OF RAILROAD RATE BUREAUS

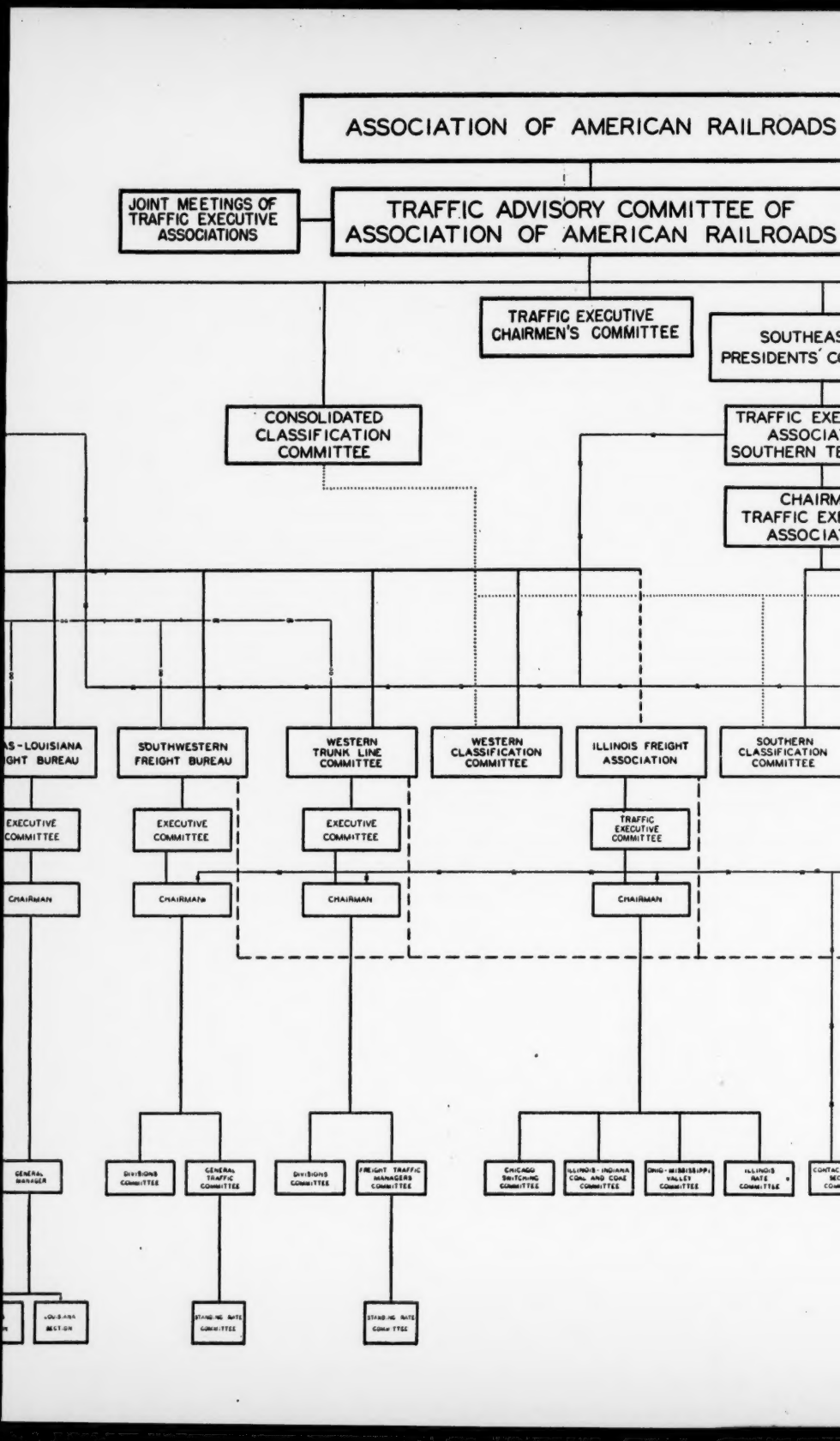
There are three major freight classification territories in the United States, which may be delineated generally as follows: official territory, east of the Mississippi River, north of the Ohio and Potomac rivers, including most of Virginia; southern territory, east of the Mississippi River and south of official territory; and western territory, west of the Mississippi River. There are five major freight-rate territories. Official

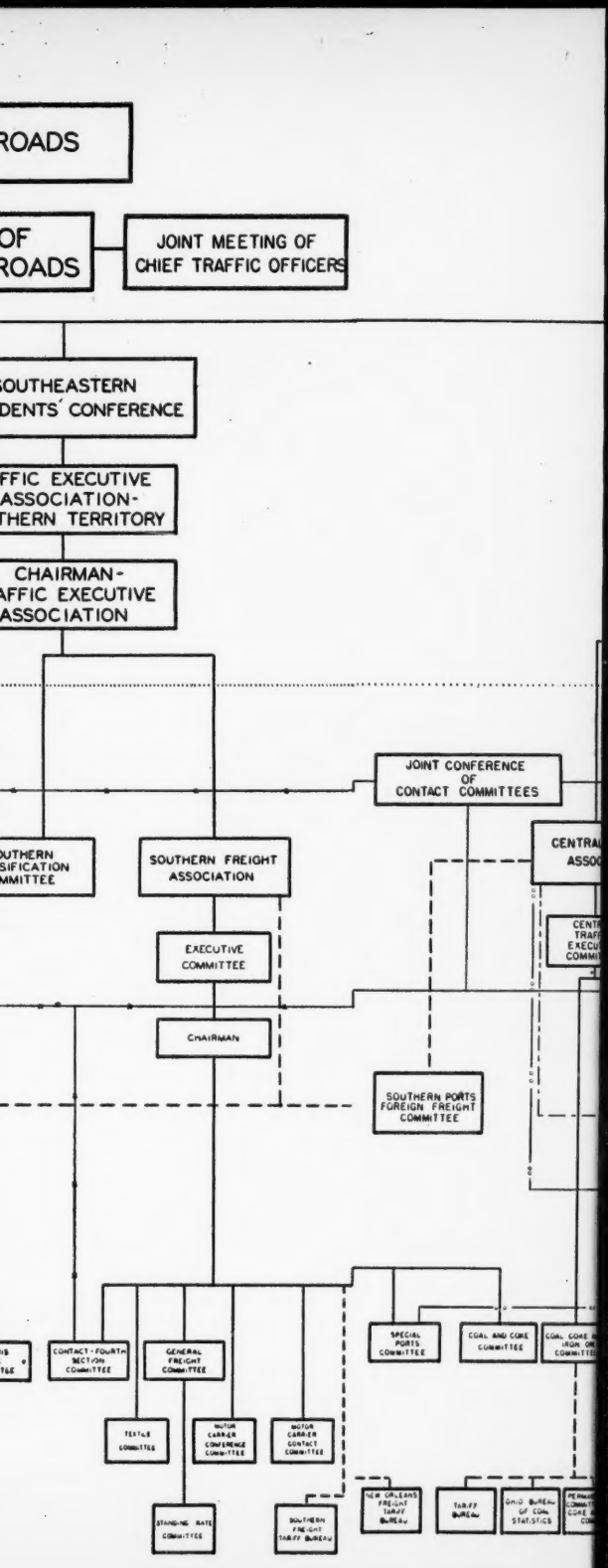
[17] *Id.*, State Exhibit 35. [18] *Id.*, State Exhibit 39. [19] *Id.*, vol. 17, p. 5813.

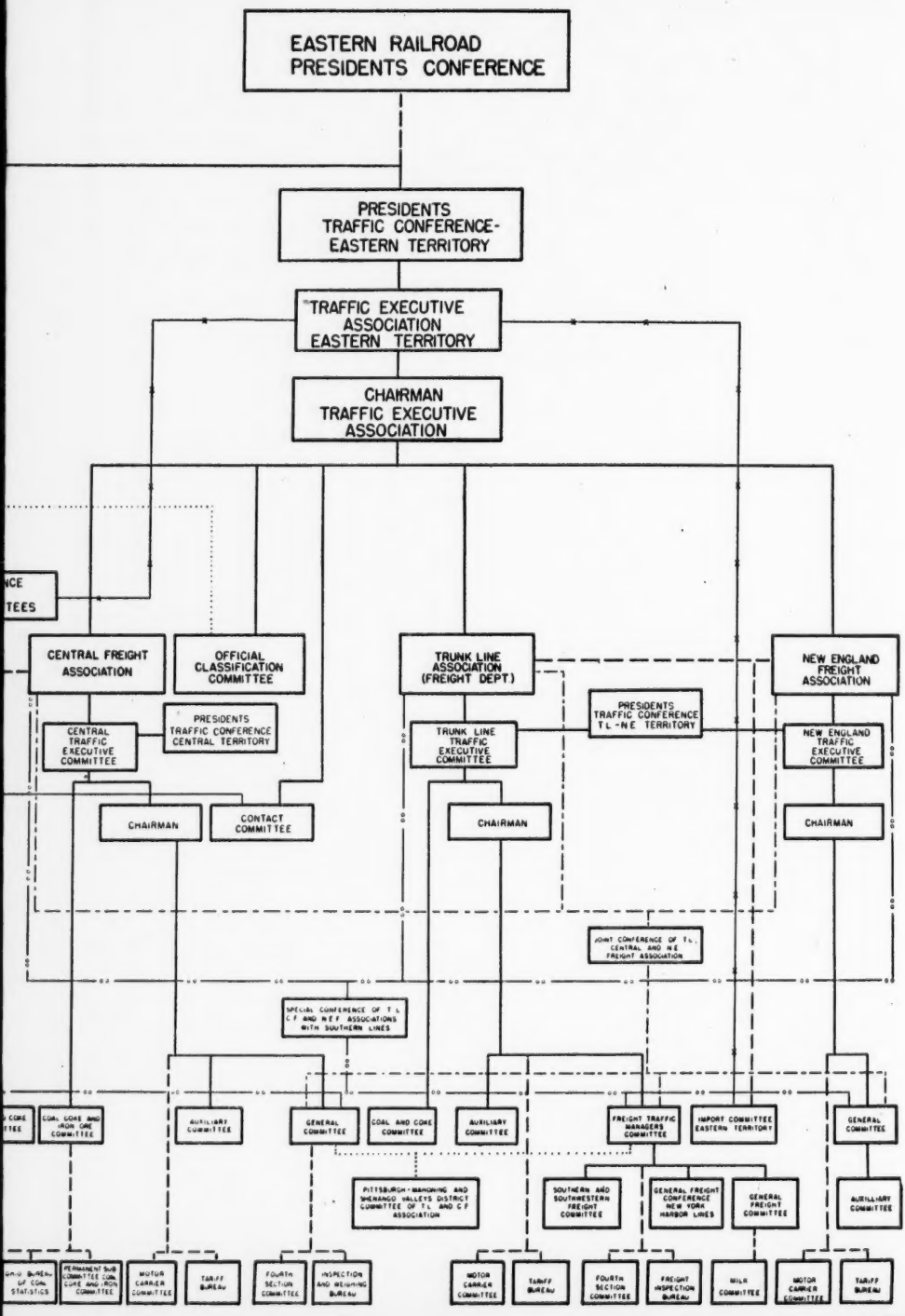
[20] See *Hearings before the Senate Committee on Interstate Commerce on H. R. 2536*, 79th Cong., 2nd Sess. 1929 (1946), for the documents pertaining to handling of the citrus fruit adjustment.

Figure I
RAILROAD RATE COMMITTEES AND ASSOCIATIONS
IN THE UNITED STATES




ASSOCIATION OF AMERICAN RAILROADS
JOINT MEETINGS OF TRAFFIC EXECUTIVE ASSOCIATIONS
TRAFFIC ADVISORY COMMITTEE OF ASSOCIATION OF AMERICAN RAILROADS
TRAFFIC EXECUTIVE CHAIRMEN'S COMMITTEE
CONSOLIDATED CLASSIFICATION COMMITTEE
SOUTHWESTERN FREIGHT BUREAU
WESTERN TRUNK LINE COMMITTEE
WESTERN CLASSIFICATION COMMITTEE
ILLINOIS FREIGHT ASSOCIATION
SOUTHERN CLASSIFICATION COMMITTEE
EXECUTIVE COMMITTEE
EXECUTIVE COMMITTEE
EXECUTIVE COMMITTEE
TRAFFIC EXECUTIVE COMMITTEE
CHAIRMAN
CHAIRMAN
CHAIRMAN
CHAIRMAN
GENERAL MANAGER
DIVISIONS COMMITTEE
GENERAL TRAFFIC COMMITTEE
DIVISIONS COMMITTEE
FREIGHT TRAFFIC MANAGERS COMMITTEE
CHICAGO SWITCHING COMMITTEE
ILLINOIS-INDIANA COAL AND COKE COMMITTEE
OHIO-MISSISSIPPI VALLEY COMMITTEE
ILLINOIS RATE COMMITTEE


ROADS
OF ROADS
JOINT MEETING OF CHIEF TRAFFIC OFFICERS
SOUTHEASTERN DENTS' CONFERENCE
FFIC EXECUTIVE ASSOCIATION- THERN TERRITORY
CHAIRMAN- AFFIC EXECUTIVE ASSOCIATION
JOINT CONFERENCE OF CONTACT COMMITTEES
SOUTHERN FREIGHT ASSOCIATION
EXECUTIVE COMMITTEE
CHAIRMAN
SOUTHERN PORTS FOREIGN FREIGHT COMMITTEE
CONTACT - FOURTH SECTION COMMITTEE
GENERAL FREIGHT COMMITTEE
SPECIAL PORTS COMMITTEE
COAL AND CORE COMMITTEE
TEXTILE COMMITTEE
MOTOR CARRIER CONFERENCE COMMITTEE
MOTOR CARRIER CONTACT COMMITTEE
STANDING RATE COMMITTEE
SOUTHERN FREIGHT TARIFF BUREAU
NEW ORLEANS FREIGHT TARIFF BUREAU
TARIFF BUREAU


EASTERN RAILROAD PRESIDENTS CONFERENCE
PRESIDENTS TRAFFIC CONFERENCE-EASTERN TERRITORY
TRAFFIC EXECUTIVE ASSOCIATION EASTERN TERRITORY
CHAIRMAN TRAFFIC EXECUTIVE ASSOCIATION
CENTRAL FREIGHT ASSOCIATION
OFFICIAL CLASSIFICATION COMMITTEE
TRUNK LINE ASSOCIATION (FREIGHT DEPT.)
NEW ENGLAND FREIGHT ASSOCIATION
CENTRAL TRAFFIC EXECUTIVE COMMITTEE
PRESIDENTS TRAFFIC CONFERENCE CENTRAL TERRITORY
TRUNK LINE TRAFFIC EXECUTIVE COMMITTEE
PRESIDENTS TRAFFIC CONFERENCE TL-NE TERRITORY
NEW ENGLAND TRAFFIC EXECUTIVE COMMITTEE
CHAIRMAN
CONTACT COMMITTEE
CHAIRMAN
CHAIRMAN
JOINT CONFERENCE OF T.L. CENTRAL AND N.E. FREIGHT ASSOCIATION
SPECIAL CONFERENCE OF T.L. C.F. AND N.E.F. ASSOCIATIONS WITH SOUTHERN LINES
COAL CODE AND IRON ORE COMMITTEE
AUXILIARY COMMITTEE
GENERAL COMMITTEE
COAL AND CODE COMMITTEE
AUXILIARY COMMITTEE
FREIGHT TRAFFIC MANAGERS COMMITTEE
IMPORT COMMITTEE EASTERN TERRITORY
GENERAL COMMITTEE
PITTSBURGH-MANGANING AND SHENANGO VALLEYS DISTRICT COMMITTEE OF T.L. AND C.F. ASSOCIATION
SOUTHERN AND SOUTHWESTERN FREIGHT COMMITTEE
GENERAL FREIGHT CONFERENCE NEW YORK HARBOR LINES
GENERAL FREIGHT COMMITTEE
AUXILLIARY COMMITTEE
PERMANENT SUB COMMITTEE COAL CODE AND IRON COMMITTEE
MOTOR CARRIER COMMITTEE
TARIFF BUREAU
FOURTH SECTION COMMITTEE
INSPECTION AND WEIGHING BUREAU
MOTOR CARRIER COMMITTEE
TARIFF BUREAU
FOURTH SECTION COMMITTEE
FREIGHT INSPECTION BUREAU
MILK COMMITTEE
MOTOR CARRIER COMMITTEE
TARIFF BUREAU

and southern rate territories are roughly coextensive with their respective classification territories, while western classification territory is divided into southwestern, western trunk-line, and mountain-Pacific rate territories.

The rate bureaus have generally adapted their organization to these rate territories and their subdivisions. Figure I shows the private rate-making machinery of the railroads and the relation of its various parts, from the lower committees in the operating rate bureaus at the bottom of the chart to the Association of American Railroads, at the top. Generally, the matters considered are introduced at the bottom and move upward, with authority for decision-making becoming progressively greater with progress toward the top of the structure—the final authority being vested in the Association of American Railroads.

To illustrate the railroad rate bureau procedure, the steps in the rate-making procedure on a proposal involving an intraterritorial rate revision applicable in southern territory will be traced through the Southern Freight Association. A proposal for a rate change may be initiated by member rail lines or by shippers and addressed to the chairman of the Southern Freight Association, who is also empowered to initiate proposals. Proposals are distributed to member lines and unless one unfavorable response is received within a stipulated time, the Southern Freight Association assumes the approval of the proposal by the membership.

Concurrently with submittal to the membership, the proposal is referred to the Standing Rate Committee for investigation and recommendation. This committee, composed of rate bureau employees and not railroad employees, is shown on Figure I at the bottom of the Southern Freight Association. Notification is given the public of the proposed change by a bulletin and through the medium of trade publications such as the *Daily Traffic Bulletin*. Upon reasonable request therefor, the chairman arranges for a public hearing if notice of the proposal has been published. Public hearings are usually conducted by the Standing Rate Committee once each week. Representatives of the public are allowed merely to present their views at these hearings but are not allowed to be present when discussions are held and decisions are made on proposals.

The articles of association provide that after the public hearing the recommendation of the Standing Rate Committee is made to the chairman of the Southern Freight Association. An objection by this committee has the same force as that of a member line. In practice the Standing Rate Committee may object before the public hearing is held. If this committee or a member line does not object, the proposal is held approved and a document called a disposition advice is issued. The chairman is empowered to fix the date upon which the change is to become effective. As there is no restriction on what date he may set, this power is very important. As will be shown, the chairman wields other great powers.

However, if there is an objection by either the Standing Rate Committee or by a member line, making up the General Freight Committee, regardless of whether the member line is in position to handle the traffic which is the subject of the pro-

posal to change the rates, the procedure for the disposition of the proposal is left to the Executive Committee of the Southern Freight Association, shown a step higher in the hierarchy on Figure I.

Although the articles of association are vague on the subject, apparently rate changes to which one or more objections are made are considered by the General Freight Committee, the action of which is by majority vote.[21] The action of this committee is announced by the chairman. Again the chairman is given authority to fix the effective date of the change. A member line may appeal the action of the General Freight Committee to the Executive Committee. The chairman is charged with the duty of appealing to the Executive Committee actions of the General Freight Committee which he considers "inimical to the interests of the southern carriers as a whole."

The Executive Committee's decision upon the proposed rate change is determined by a majority of those members expressing views. A member may appeal the action to the Traffic Executive Association—Southern Territory, another notch up in the hierarchy. The chairman of the Southern Freight Association is charged with appealing from the actions of the Executive Committee when he considers the decision of that committee inimical to the interests of the southern carriers as a whole.

It should be kept in mind that the articles of association of the Southern Freight Association provide that pending consideration by these various groups no action shall be taken toward making the rate change effective and available for use by the shipping public.

Appeal lies from the decision of the Traffic Executive Association—Southern Territory to the Southeastern Presidents' Conference, thence to the Association of American Railroads. In view of this maze of appellate machinery to which the member lines are bound, the right of independent action mentioned frequently in various articles of association of the rate bureaus is of questionable value to a member bound by the private rate-fixing system. Evidence is available that a single railroad wishing to make a downward adjustment of rates applying entirely on its own lines has, in the course of traversing the maze, been dissuaded from exercising its managerial discretion in lowering rates to meet the needs of shippers using that railroad. The following case is an example of such evidence.[22]

On October 11, 1941, the Southern Railway submitted to the Southern Freight Association a proposal for a reduced rate on logs from certain stations in northwestern Alabama to Alta Vista, Virginia, the entire movement being over the lines of the Southern Railway. The Southern Railway in its proposal stated that it felt that the reduced rate was necessary in order to enable the logs to move from the Alabama points. When the proposal was submitted by the Southern Freight Association to its members, the principal rail objection was predicated upon the dangerous competitive influences that might be set in motion by the suggested arrangement.

[21] The articles of association of the various rate bureaus are on file with the Interstate Commerce Commission and are available for inspection by the public.

[22] Record before the Special Master, *supra*, note 13, State Exhibit 194 *et seq.*

The proposal was disapproved initially by the General Freight Committee by majority vote. It was then appealed to the Executive Committee where it was again disapproved by majority vote. Finally an appeal was taken to the Traffic Executive Association—Southern Territory. On July 20, 1943, twenty-two months after the proposal was first filed, it was stricken from the docket of the Traffic Executive Association.

This illustration demonstrates that the power of the rate-bureau organization to coerce, prevent, hinder, and delay the filing of rate proposals is not limited to situations where the railroads confer upon the formation of joint rates. Here the entire movement was over the lines of the proponent railroad; even so, its managerial judgment was subjected to the concerted judgment of the other members of the Southern Freight Association, none of whom were parties to the rate proposed.

Another important aspect of railroad rate-bureau procedure is the handling of a revision in an interterritorial rate, that is, one applicable for the movement from one rate-bureau jurisdiction into another. This may be illustrated by tracing the major steps required by rate-bureau procedure when the proposed change involves a rate change applying from southern territory to trunk-line territory, one of the subdivisions of official territory.

The proposal is submitted for approval to the Southern Freight Association by a rail carrier in southern territory that wishes to obtain rates for a southern producer to allow him to ship to trunk-line territory on a basis lower than the existing rates, which are in many cases too high to allow producers to enter the official territory profitably. The rate-bureau procedure does not allow the rail carrier in southern territory to negotiate directly with the official-territory lines necessary to make complete routes for movement of the traffic. The proposal must conform to the rate-bureau procedure, which requires obtaining approval of other members of the Southern Freight Association as a first step. At the same time that the proposal is referred to members of the Southern Freight Association, it is submitted to all three jurisdictions in official territory—the New England, Trunk-Line, and Central Freight Associations—for consideration, despite the fact that the rates proposed are to apply to only one of these territories, trunk-line territory.[23] By this procedure official-territory railroads that do not handle the traffic vote upon the measure.

Assume that one of the three private rate-making groups, the New England Freight Association, disapproves the proposal. The procedure of the Traffic Executive Association—Eastern Territory for handling interterritorial proposals provides that:

> Propositions shall not be considered disposed of unless action by the CFA [Central Freight Association], TLA [Trunk-Line Association], and NEFA [New England Freight

[23] The rate-making subdivisions of official territory and their approximate boundaries are: New England territory, embracing the six states generally understood to constitute New England; trunk-line territory, the area west of New England to the so-called Buffalo-Pittsburgh line, a line drawn from Buffalo to Pittsburgh and thence following the Ohio River along the western boundary of West Virginia; and central territory, the area west of trunk-line territory to the Mississippi River.

Association], is uniform. When the action of the separate Official Territory jurisdictions is otherwise, the proposition will be docketed for consideration and disposition by Joint Conference of Official Territory lines [composed of representatives of the three official territory rate bureaus].

The procedure of the Joint Conference of official-territory lines provides much the same:

> No general basis [of rates] shall be established *in any territory* unless concurred in by the three territorial committees, and, in the event of negative action taken on a proposal for such basis by one or more of the committees, it may be referred to the Joint Conference for disposition. (Italics supplied.)

To obtain approval in the Joint Conference for this reduction in rates from southern territory to trunk-line territory it is necessary that an affirmative vote of three-fourths of the members present of two of the official-territory rate bureaus be obtained. Under this procedure the determination of rates paid on the goods of the southern producer is in the hands of representatives of rate territories to which the rates are not proposed to apply. Appeal may be made to the Traffic Executive Association—Eastern Territory from the decisions of the Joint Conference of official-territory lines, not by the shipper, but by railroads members of the official-territory bureaus. The shipper has no right of appeal in the private rate-making system.

It is quite probable that one or more of the official-territory bureaus would object to a rate from the South reduced to something near the level available to the producers shipping within official territory, because the official lines have announced the policy of keeping goods from the South and West competitive with those produced on their lines from moving into official territory.[24]

In interterritorial rate matters similar to this proposal to adjust rates from southern territory to a subdivision of official territory, negotiations to bring the decisions of the two territories into harmony may be carried on in the Joint Conference of Contact Committees. On rate proposals affecting official, southern, southwestern, and western trunk-line territories, the action of the territorial committees may be followed by reference of the proposed change to the Joint Conference of Contact Committees, made up of representatives of seven private rate-making organizations: three from the official-territory associations, and one each from Southern Freight Association, Western Trunk-Line Committee, Southwestern Freight Bureau, and Illinois Freight Association. From the decision of the Joint Conference of Contact Committees, which is by majority vote, the representatives of a group may appeal to their Traffic Executive Association. Negotiations may then take place between the traffic executive associations.

Here is a typical example of the handling of a proposed change in an interterritorial rate.[25]

[24] *Ex parte* 116—Interterritorial Rate Bases. Before the Interstate Commerce Commission, memorandum brief for carriers operating in official territory, named in appendix thereof: M. B. Pierce and others, counsel. (Washington, 1935.)

[25] Record before the Special Master, *supra*, note 13, State Exhibit 237 *et seq.*

On January 7, 1943, the Southern Railway requested that an emergency proposal be issued to the membership of the Southern Freight Association to establish rates on wine from Atlanta, Georgia, to points in official territory, including Illinois Freight Association territory, on the same level as that prevailing within official territory, stating that an Atlanta shipper was unable to market his wines in official territory on the existing rates. The shipper complained of the fact that for minimum weights on shipments of 50,000 and 60,000 pounds the rates from California terminals to New York City were 99 cents whereas the rates from Atlanta to those same terminals for approximately one-third of the distance were, roughly, $1.13 and $1.12.

The Southern Freight Association promptly approved the emergency proposal and on February 5, 1943, forwarded it to the official lines. On April 14, 1944, the emergency proposal, having consumed fourteen months pursuing the usual course through the official-territory appellate mechanisms, met the usual fate; it was rejected, and this despite the fact that:

> . . . the present shipments from Atlanta to the North and East are difficult of satisfactory explanation. . . . While unfortified wines produced in Atlanta are not directly competitive with fortified wines produced in California, the politicians constantly refer to the fact that to New York the rates from California are less than from Atlanta. . . .[26]

Despite the refusal of the official lines to concur in eliminating this gross discrimination, the southern lines independently effectuated the desired rates to Chicago by virtue of the fact that the line of the Illinois Central served both Chicago and the South. However, the official lines persisted in their discriminatory policy and during the proceedings in the *Class Rate* case the Atlanta shipper was still complaining about the rate wall between him and the consuming markets in official territory.[27]

This attitude on the part of the official lines was aptly described by a prominent traffic man when he stated that a similar proposal ". . . met the usual fate of all inter-territorial problems that come from the little man. It was non-concurred in very promptly by the Official Territorial [*sic*] lines. . . ."[28]

IV

PRIVATE RATE-MAKING PROCEDURE NOT IN CONFORMITY WITH THE LAW

There is no question that the railroads, in the establishment of their rates, are subject to the Sherman Act.[29] As has been pointed out, conspiracies among railroads to fix freight rates have been held illegal under the Sherman Act.[30] Congress has not given the Interstate Commerce Commission, nor any other group, power to remove the making of freight rates from the prohibitions embodied in the antitrust

[26] *Ibid.*

[27] *Id.*, vol. 9, p. 2640.

[28] Record, The States of New York, Delaware, *et al.* v. United States, *et al.*, Supreme Court of the United States, October Term, 1946, No. 343, p. 4752.

[29] United States v. Southern Pacific Co., *et al.*, 259 U. S. 214 (1922).

[30] United States v. Trans-Missouri Freight Association, 166 U. S. 290 (1897); United States v. Joint Traffic Association, 171 U. S. 505 (1898).

laws.[31] It is also true that regulated industries are not *ipso facto* exempt from the antitrust laws.[32]

In the case of *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway*[33] the Supreme Court went into the history of regulation in some detail. After noting that the exaction of unreasonable rates by public carriers was forbidden by the common law, the court said:

> But we are here specially concerned with the Interstate Commerce Act of 1887 and with some of the changes or supplements adopted since its original enactment. That act did not take from the carriers their power to initiate rates—that is, the power in the first instance to fix rates, or to increase or to reduce them. *Skinner & Eddy Corp. v. United States* (249 U. S. 557, 564); *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Comm.* (162 U. S. 184, 197).[34]

In *Texas & Pacific Railway v. United States*,[35] the court said:

> As the carriers are in competition for the business they may, within the zone of reasonableness, prescribed by the statute, adjust their rates so as to obtain or retain the desired traffic for their own lines. (*Interstate Commerce Commission v. Alabama Midland Ry. Co.* (74 Fed. 715, 723-4; 168 U. S. 144, 172-3; *Skinner & Eddy Corp. v. United States* (249 U. S. 557, 564); *United States v. Illinois Central R. Co.* (263 U. S. 515, 522).)[36]

Since 1943 Congress has several times considered legislation proposed to exempt the railroads from the antitrust laws in the making of rates, but has refused to enact these proposals into law.[37] As lately as 1945 the Supreme Court has held, after review of the decisions concerning railroad rate-making combinations, that ". . . we can only conclude that they have no immunity from the antitrust laws."[38]

These decisions do not mean that railroads are entirely barred from conferring in the making of rates. The writer, however, construes the law to mean that in the making of local rates—those rates which apply on the lines of a single carrier—each railroad is allowed and required to exercise its own managerial discretion free from collaboration with, or interference by, its competitors. The Supreme Court has held that "a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise."[39] In initiating its local rates it would seem that each carrier should file the rates which it considers proper with the Interstate Commerce Commission without being forced to submit these rates to the consideration or approval of other railroads in the private rate-making organizations.

If for some reason the rates are not in conformity with the provisions of the Interstate Commerce Act, proper action can be taken before the Interstate Commerce Commission, the regulatory body authorized by law to handle such matters. To

[31] State of Georgia v. The Pennsylvania R. R., *et al.*, 324 U. S. 439, 456 (1945).
[32] United States v. Borden Co., 308 U. S. 188, 198 (1939).
[33] 284 U. S. 370 (1932). [34] *Id.* at 383-384. [35] 289 U. S. 627 (1933).
[36] *Id.* at 636.
[37] S. 942, 78th Cong., 1st Sess. (1943); H. R. 2536, 79th Cong., 2nd Sess. (1946); S. 110 and H. R. 221, 80th Cong., 1st Sess. (1947).
[38] State of Georgia v. The Pennsylvania R. R., 324 U. S. 439, 457 (1945).
[39] United States v. Illinois Central R. R., 263 U. S. 515, 522 (1924).

allow a private group to interfere with an individual railroad in the making of its local rates, as was done in the matter of the rate on logs proposed by the Southern Railway to apply on its own lines, is not within the contemplation of the law.

Although defenders of the present system of making rates claim that the collective judgment of a group of railroads as to the proper rates under the Interstate Commerce Act is better than that of a single railroad, it has been admitted that the single line's judgment is often superior to that of the group.[40] It is somewhat unusual in business relations for one's competitors to be so solicitous concerning one's compliance with the law, and to be allowed a voice in matters for which the individual business is legally responsible. The law apparently requires each railroad to establish its own rates. Free from rate-bureau interference, this should be done. Such freedom of action is further bolstered by the Supreme Court's holding that "a zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself."[41] Within that zone the Interstate Commerce Commission is powerless to grant relief even though freight rates are raised to the maxima by a conspiracy among rail carriers.[42] Unless competition prevails in this zone, the public is powerless to overcome rates pushed to the upper limits of the zone by combinations of carriers acting through the private rate-making organizations.

One of the principal contentions of defenders of the status quo in private rate making is that it is absolutely essential that railroads participate in the private rate-making process in order to establish joint rates, that is, rates that apply to traffic moving over more than one railroad between origin and destination. Further, these advocates contend that the Department of Justice would abolish rate bureaus and require each railroad to make its rates in a "vacuum." Such is not the position of the Department of Justice. There is no more desire to eradicate the rate bureaus by antitrust action than there was to put out of business, for instance, the Aluminum Company of America when it was named defendant in an antitrust suit a few years ago. The Federal Government merely wants the rate bureaus to conform to the law just as other forms of business are required to do.

In other words, it is not the rate bureaus as such that the Department is opposing. The objection is to a number of the features of the operations of the private rate-making groups. The writer believes that the rate bureaus can change and simplify their operations to eliminate antitrust violations without in any way hindering or jeopardizing conformity with the Interstate Commerce Act by the carriers. The ways in which this can be done will be pointed out in the final section of this paper.

Under section 1(4) of the Interstate Commerce Act it is "the duty of every common carrier [railroad] . . . to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto."[43] Agreement among carriers is provided for in the establishment of joint

[40] Record before the Special Master, *supra*, note 13, at 4759.
[41] United States v. Chicago, M., St. P. & P. R. R., 294 U. S. 499, 506 (1935).
[42] State of Georgia v. The Pennsylvania R. R., 324 U. S. 439, 461 (1945).
[43] 54 STAT. 900, 49 U. S. C. §1(4) (1940).

rates by section 6.[44] In the words of the Supreme Court, ". . . it would be a perversion of those sections to hold that they legalize a rate fixing combination. . . . The collaboration contemplated in the fixing of through and joint rates is of a restrictive nature."[45]

The railroads themselves suspect that the continued operation of the private rate-making organizations along the lines that are now being followed do not conform to the "legitimate area in which that collaboration may operate."[46] At least some of the things that are prohibited in the process of establishing joint rates were indicated by the court's holding that:

> . . . we find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier.[47]

Defenders of private rate making point to the provision in the articles of association of the rate bureaus which purports to guarantee each carrier the right of independent action in the making of rates as assurance that there is no infringement on the freedom of individual rail lines. This, of course, is an illusory right when other provisions of the same articles to which the members subscribe provide that the individual railroads will act, or refrain from acting, subject to the will of the majority of the members, or the chairman, of the organization. Until the individual railroads are allowed to act, and do in fact act, independently, private rate making will not be free of violations of the Sherman Act.

Concerning voluntary cooperation, the alleged basis of private rate making, the Supreme Court said, in holding the Agricultural Adjustment Act unconstitutional:

> The Government asserts that whatever might be said against the validity of the plan if compulsory, it is constitutionally sound because the end is accomplished by voluntary cooperation. There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. . . . This is coercion by economic pressure. The asserted power of choice is illusory.[48]

This "coercion by economic pressure" is well illustrated by the action of President Joyce, of the Chicago Great Western, receding from a position leading to a rate reduction on packinghouse products, after a "conference" with members of the committee of directors of the Western Commissioner Plan.

Another source of economic pressure available to bring recalcitrant railroads into

[44] 24 STAT. 380 (1887), as amended, 49 U. S. C. §1(4) (1940).
[45] State of Georgia v. The Pennsylvania R. R., 324 U. S. 439, 457 (1945).
[46] *Ibid.* [47] *Id.* at 458.
[48] United States v. Butler, 297 U. S. 1, 70, 71 (1936).

line was testified to before a Senate committee by Mr. Sargent, President of the Chicago & Northwestern Railway Company. He stated that the matter of divisions (apportionments of revenue accruing to each of the carriers participating in a joint haul) was a delicate matter for a single railroad to take to the Interstate Commerce Commission for adjudication because "there is a tendency for a diversion of traffic" away from lines bringing such a complaint.[49] As freight traffic is the life blood of the railroads, this particular kind of economic pressure is extremely effective.

V

SUGGESTIONS FOR BRINGING RATE-BUREAU PROCEDURE INTO LINE WITH THE ANTITRUST LAWS

Suggestions for changing the procedures of the private rate-making organizations in order that their operations will comply with the antitrust laws should be of special interest to those who maintain that the features of the present system are essential if the railroads are to comply with the Interstate Commerce Act. If the desire to observe the provisions of that Act is the sole motivation for maintaining the present elaborate system of private rate-making machinery, the suggestions made here could be acted upon without impairing observance of the Act by the carriers.

In the establishment of local rates, it has already been indicated that each railroad should exercise its managerial discretion free from rate-bureau participation. If individual railroads are to be free from the influence of competitors, these rates should be filed directly with the Interstate Commerce Commission. Submitting such rates to the rate bureaus for consideration is obviously unnecessary if each carrier is to exercise the right given it under the law to initiate its own rates. Consequently, no local rates should be handled in the rate bureaus. The service of a tariff-publishing agent could be used for publishing these rates, but since such an agent would merely publish rates as directed by the individual lines his function should be strictly a ministerial one.

Notice of the action of an individual road upon filing a change in its local rates with the Interstate Commerce Commission could be given at the time of the filing, thereby informing other railroads and shippers of the action. Notice to the rate bureau prior to filing would be unnecessary. Under this arrangement anyone having a complaint against the proposed rate could, within the time allowed for such complaints to be made, file with the Interstate Commerce Commission a request for investigation and suspension of the rate. The Commission, under the authority vested in it by law, could grant or deny the request for investigation and suspension. If the request were denied, the rate would go into effect upon expiration of the statutory period after filing unless the Commission saw fit to shorten the period as provided by statute. If the request were granted, the matter would be set down for hearing on the merits. This is in accordance with the regulatory process and is

[49] *Hearings before Senate Committee on Interstate Commerce on S. Res. 71 of the 74th Cong.*, 75th Cong., 2nd Sess. Part 3, 9966, at 9970 (1938). Mr. Joyce of the Chicago Great Western concurred in this testimony.

preferable, as a practical matter, to dragging the decision through committee after committee in the private rate-making groups. The Interstate Commerce Commission should exercise its regulatory power; that power should not be delegated to private groups.

In the making of joint rates, as pointed out, a degree of collaboration among railroads is permissible. No one would gainsay this right. Common sense dictates it, the Interstate Commerce Act provides for it, and the Sherman Act does not forbid it. But it must be remembered that, in the words of the Supreme Court, "the collaboration contemplated in the fixing of through and joint rates is of a restrictive nature."[50]

The suggestions given here comprise the writer's conception of what might be done under this ruling of the Supreme Court in rate bureaus in the formulation of joint rates. Local rates, of course, would not be handled in rate bureaus.

In the first place, it would be necessary to eliminate all appellate functions from the private rate-making procedure. Using the Southern Freight Association as an example and referring to Figure I, the executive committee would be abolished, as would the Traffic Executive Association—Southern Territory and the Southeastern Presidents' Conference. The rate-making functions of the Association of American Railroads would be done away with entirely. The law does not require that any sort of rate organization be maintained there.

The cutting away of these groups, which have been shown to be at least conducive to delay, and, in many instances, to coercion of individual railroads, would leave two functions in the regional rate bureaus. First, the function of giving technical advice on the legality of proposed rates under the Interstate Commerce Act. Such advice would be limited to technical matters and not to matters of policy concerning the desirability of a proposed rate. Second, the bureau would be a meeting place for discussions concerning the establishment of joint rates, either intraterritorial or interterritorial. These discussion groups should be limited to the railroads actually participating in the traffic movement on which the joint rates are proposed to apply. They should be further limited to exchange of information on joint rate proposals, with no coercion or pressure being exerted upon any railroad. After discussion has been terminated, a representative of each railroad should be free to indicate to the publishing agent whether his railroad wishes to be included among those railroads participating in the joint rate proposals discussed in the meeting.

These meetings for the discussion of matters pertaining to joint rates should be open to the public, and a stenographic transcript should be made of the proceedings. This transcript should be available for public inspection at reasonable times in the offices of the rate bureau. Shippers, representatives of shipper groups, representatives of regulatory and other state or Federal Government agencies, and anyone else who might be interested in any action on joint rates handled by that bureau, would find a complete record available for their use.

[50] State of Georgia v. The Pennsylvania R. R., 324 U. S. 439, 457 (1945).

Such a procedure would be in marked contrast to the present one in which shippers are limited to appearing and expressing their views on a rate adjustment in which they are interested. At present the decision on the granting of a proposed rate is made in secret by the railroads. Unless the rules of secrecy of the rate bureau are violated by some railroad representative present, the interested shipper does not know why the proposal was turned down, who opposed granting it, or any of the other matters discussed in the secret meeting.

Defenders of the status quo in rate-bureau operation argue that these secret meetings are necessary to protect the small shippers because the large shippers would, if the meetings were open, learn the identity of carriers opposing their proposals and would be able, by controlling the routing of large volumes of traffic, to obtain favorable rates for themselves. On the other hand, it is argued, small shippers have no club of large amounts of traffic to hold over the heads of the carriers and would be denied rates as favorable as those granted large shippers.

It is no secret in traffic circles that large shippers have no trouble at present in obtaining favorable rates. If the publicity emanating from open discussions of joint rates should adversely affect small shippers, the Interstate Commerce Commission could take appropriate action to correct such abuses.

At present the chairmen of organizations such as the Southern Freight Association exercise great powers, such as the power to appeal to a higher committee from a decision "inimical to the interests of the carriers as a whole" and the power to establish the effective date of any rate published by the carriers in the organization. These powers should be taken away entirely, thereby removing this threat to freedom of action and free exercise of managerial discretion by railroads in the establishment of their rates.

Expressed in a few words, the changes set forth would allow carriers participating in a proposed joint rate to discuss freely the various aspects of the legality of the rate. After full and free discussion each carrier would be free in fact to determine whether, in the exercise of its managerial discretion, it wishes to participate in the joint rate, or take some other course of action. There would be no appeals, either by railroads or by the chairmen. After receiving instructions from the carriers, the tariff-publishing agent would publish the joint rate, excluding from participation those carriers that wish to be excluded.

A free exchange of information in regard to each joint rate proposal handled would be allowed and encouraged. If there should be difference in opinion as to whether a proposal contravenes the Interstate Commerce Act, the Interstate Commerce Commission could be called upon to adjudicate the points of disagreement. The Commission is established to make such decisions. Its decision, everyone will agree, is of more value than that of any series of committees part and parcel of the present private rate-making process.

VI

PROPOSED LEGISLATION TO EXEMPT COMMON CARRIERS FROM THE ANTITRUST LAWS

Pending in the Eightieth Congress are S. 110, introduced by Senator Reed of Kansas, and H. R. 221, introduced by Representative Bulwinkle of North Carolina. These bills authorize all common carriers, and freight forwarders, to apply to the Interstate Commerce Commission for approval of agreements concerning transportation services and charges and practices related thereto. Upon approval of an agreement by the Interstate Commerce Commission, the carriers involved would be exempt from the application of the antitrust laws. Not only the agreements under which the rate bureaus operate would be subject to exemption from the antitrust laws, but also any other agreements incidental to the conduct of common-carrier transportation service.

The legislation provides, in effect, that only the agreements under which private rate-making is carried on need be approved by the Interstate Commerce Commission; acts performed under the agreements do not require Commission approval. Thus, if the carriers, after approval of the agreements by the Commission giving exemption from the antitrust laws, choose to act to hold rates to the upper level of the zone of reasonableness, they may do so. The proposed legislation if enacted into law "would cut the antitrust laws from the heart of our economy—the transportation industry."[51]

As Professor Sharfman has pointed out, the regulatory pattern chosen by Congress for the railroad industry provided for competition and freedom of action for individual railroads in the making of rates.[52] The preservation of competition in rate making is essential to conform to the long-established legislative scheme inherent in the Interstate Commerce Act. To depart from this basic scheme by delegating to private groups power to fix transportation rates would completely reverse the purpose of the Interstate Commerce Act that rates be made through the operation of competitive factors within the zone of reasonableness, which is bounded at the top by the Commission's power to establish maximum rates and at the bottom by the power to establish minimum rates.

No one acquainted with the situation can effectively deny that the purpose of the proposed legislation is to deprive the courts of jurisdiction in the pending cases instituted by the Department of Justice and the State of Georgia. The Department, in the suit in the United States District Court at Lincoln, Nebraska, is endeavoring to enjoin combinations of railroads, railroad organizations, and bankers from violating the Sherman Act. Among the offenses charged are the fixing of discriminatory freight rates, suppressing improvements in railroad service, limiting improvement in rail equipment and facilities, and hindering the development of forms of transportation that compete with railroads.

The suit of the State of Georgia, now being heard before Special Master Lloyd

[51] SEN. REP. No. 44 to accompany S. 110, 80th Cong., 1st Sess. (1947). Individual views of Mr. Tobey, at 18.

[52] 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 79-81 (1931).

K. Garrison, appointed by the Supreme Court, seeks to enjoin the principal northern and southern railroads from fixing discriminatory and non-competitive freight rates harmful to the economy of Georgia. In taking jurisdiction of this case, the Supreme Court referred to the permissible area of collaboration in the making of joint rates and stated that "we do not stop at this stage of the proceedings to delineate the legitimate area in which that collaboration may operate."[53]

Obviously, the Supreme Court will define the permissible area of collaboration in handing down its decision in the *Georgia* case unless the case is rendered moot by the passage of legislation. To say that transportation agencies will be unable to establish rates in accordance with the Interstate Commerce Act if this case, or the Government's case at Lincoln, is carried to a conclusion, is utter nonsense. There is time enough after the Supreme Court has acted to make such assertions—if then there is ground for such assertions to be made. If Congress sets out to amend the antitrust laws each time a powerful group is haled into court because the defendants anticipate that an unpalatable decision will be rendered, the legislative mill will have available plenty of grist. For the same reason it seems a little forehanded to reverse completely the direction of transportation policy in the United States because the transportation industries anticipate that some restriction on their illegal activities may result from a decision of the Supreme Court.

If either the Reed Bill or the Bulwinkle Bill should become law, a dangerous precedent would be established. Other industries that are now seeking exemption from the antitrust laws would be encouraged to increase their efforts. Other powerful groups would be invited to seek legislation immunizing them from established laws and the power of the courts to enforce them.

Monopoly in the transportation field cannot be isolated from the operation of the national economy, because the power to control the cost of transportation is a power that may be used to dictate whether a business shall prosper or shall be stifled. The proposed legislation sets a pattern for supplanting the American system of competitive enterprise by a cartelization of the Nation's entire economy. The proposed legislation should not become law.

[53] State of Georgia v. The Pennsylvania R. R., 324 U. S. 439, at 457 (1945).

RATE CONFERENCES IN THE RAILROAD INDUSTRY UNDER THE SHERMAN ACT AND THE ACT TO REGULATE COMMERCE

JOHN DICKINSON*

The Editor of LAW AND CONTEMPORARY PROBLEMS has asked me to contribute an article to this symposium with knowledge that I am engaged as counsel in a case now *sub judice* which presents for judicial consideration some of the questions to which the symposium is addressed. The practice of publicly discussing cases which are *sub judice* is one for which we doubtless have to thank the law reviews; but it has spread far beyond them. Lawyers who have made arguments and signed briefs for the United States Department of Justice and for the State of Georgia on the other side of the case which I have mentioned have broadcast books, articles, and speeches discussing the case,[1] doubtless on the theory that they know more about it, and are, therefore, better qualified to inform the public, than commentators more remote from the controversy.

In spite of these examples, the present writer does not intend to discuss here the so-called *Georgia* case, nor those issues in it which he believes to be the controlling ones on which the decision should turn. There is, however, a legitimate field for public discussion of such cases in so far as they involve, aside from the special facts and issues peculiar to the case, broad matters of public policy which reach beyond any particular case, and on which public opinion needs to be informed. Thus there would seem no reason why a lawyer should refrain from discussing capital punishment because he is engaged in a murder case, or the question of the purity of the ballot because he is prosecuting election frauds. On the same principle, there are questions of public policy related to some of the issues in the *Georgia* case which are proper for public discussion without reference to the facts and issues peculiar to that case.

In the *Georgia* case, the plaintiff State charges a coercive conspiracy through the

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[1] See for example: Chapters 11, 12 and 13 of ARNALL, THE SHORE DIMLY SEEN (1946); pages 52-54 of Arne C. Wiprud's review of Arnall's book in 33 A. B. A. J. 52 (1947); chapters I-VI of WIPRUD, JUSTICE IN TRANSPORTATION (1945); pages 910-912 of Ellis Gibbs Arnall's review of Wiprud's book in 54 YALE L. J. 910 (1945); chapters X-XIII of BERGE, ECONOMIC FREEDOM FOR THE WEST (1946); pages 127-128 of Wiprud's review of Berge's book in 14 U. OF CHI. L. REV. 127 (1946); the entire article of Edward Dumbauld, *Rate-Fixing Conspiracies in Regulated Industries,* 95 U. OF PA. L. REV. 643 (1947). Governor Arnall, chief counsel for Georgia before the Supreme Court, appeared before the Senate Committee on Interstate Commerce in 1946 in the course of hearings on H.R. 2536 to testify "in behalf of the public," and not only took this occasion to argue Georgia's side of the case (*Hearings before the Senate Committee on Interstate Commerce on H.R. 2536,* 79th Cong., 2d Sess. 418-551 (1946)), but stated that if the Senate did not pass the bill then before it, he could state authoritatively that Georgia would win the case. *Id.* at 435.

alleged use of rate conferences and associations by the defendant railroads, northern and southern, to charge rates which are said to discriminate against Georgia.[2] In others words, the plaintiff charges that the rate conferences have been used for an improper purpose, and in ways that are wrongful and damaging to a particular state or section. The charge is thus one of abuse or misuse of the conferences. With that charge, which the defendant railroads contend is the proper and substantial issue in Georgia's case, and which she must prove if she is to prevail, this article will not deal, as the matter is one of evidence now under consideration by a special master appointed by the Court.[3]

Wholly apart, however, from these special averments and issues in the *Georgia* case, there remains a broad general question of antitrust law as to whether or not rate conferences in the railroad industry are in and of themselves, and without reference to any charge of abuse or discrimination, violations of the Sherman Act *per se*. This is a question of law and principle which can be discussed generally, and without specific reference to Georgia any more than to any other state or section of the Union. This discussion may appropriately lead up to the further question of whether there is anything inherent in the rate conferences, or in their procedures, which makes them necessarily discriminatory against any state or section.

I

It is a practice of fifty years' standing for the railroads of the United States in each of the historic territorial rate subdivisions[4] to confer together about a proposed rate change before any railroad or railroads make the change by filing a tariff with the Interstate Commerce Commission. The usual course is for the proponent road to send notice of the proposal to the territorial association, which places it on a public docket that is given wide publicity among shippers. On a date therein specified, shippers are invited to appear and express their views with respect to the proposal.[5] In this way, the railroads are informed in advance whether any shippers or communities assert rights under the Interstate Commerce Act that would be violated by the new rate, or claim that it would otherwise adversely affect them. With this in-

[2] Georgia v. Pennsylvania R. R., 324 U. S. 439, 445 (1945).

[3] Special Master Lloyd K. Garrison was appointed by order of the Court on December 17, 1945. See Georgia v. Pennsylvania R. R., 326 U. S. 693 (1945).

[4] The five major rate territories are official (northern) territory, southern territory, western trunk-line territory, southwestern territory, and mountain-Pacific territory. Official territory has three subdivisions, distinguished by their respective conference organizations which are as follows: New England Freight Association, Trunk Line Association, and Central Freight Association. See Justice Douglas' opinion in New York v. United States, 67 Sup. Ct. 1207, 1211 n. (1947), for a brief and lucid description of the boundaries of the major rate territories.

[5] See pages 43-45 of REPORT ON RATE-MAKING AND RATE-PUBLISHING PROCEDURES OF RAILROAD, MOTOR, AND WATER CARRIERS, submitted to the President and Congress on Nov. 24, 1943, by the Board of Investigation and Research, acting pursuant to section 302(b) of the Transportation Act of 1940. This document, which was printed as H. R. Doc. No. 363, 78th Cong., 1st Sess (1943), and which is hereinafter cited as REPORT ON RATE-MAKING PROCEDURES, includes at pages 41-50 a detailed discussion of the jurisdiction, membership, organization, and procedure of railroad rate bureaus. It is pointed out at page 43 that under typical procedure, shippers, shippers' organizations, other railroad associations, and Government departments may also submit proposals directly to the bureau.

formation before them, a committee of representatives of the railroads of the territory discusses the proposal; and each road, as a method of expressing its views, votes whether or not the proposal should be "recommended." If the matter is contentious, it may be "appealed," *i.e.*, brought for further discussion before committees consisting of higher officers of the railroads. Irrespective of the "votes" in the different committees, the proponent railroad may at any time, and frequently does, put the proposal into effect by its "independent action."[6] No railroad has to wait for the proposal to pass through the different committees, if it does not wish to do so.

The available statistics show that the vast majority of proposals are disposed of by correspondence without requiring discussion in any of the committees, and that the number of so-called "appeals" is very small. Any railroad is free to by-pass the conference procedure altogether with respect to a rate proposal, but that procedure is usually followed as an almost indispensable method of ascertaining what effect the proposal would have on shippers and other railroads, which have a legal interest under the Interstate Commerce Act in the rates that affect them.[7]

A large proportion of railroad rates, including most of those which give rise to controversy, are so-called "joint through rates" between origins and destinations not reached by the same railroad, and which therefore require the participation of two or more connecting roads.[8] Often the connecting roads, whose concurrence is necessary to establish the rate, are located in different rate territories. Thus, a joint through rate between Atlanta, Georgia, and Buffalo, New York, requires the concurrence of a railroad or railroads like the Southern, the Seaboard, and the Louisville & Nashville, which belong to the Southern Rate Association, and the Pennsylvania, Baltimore & Ohio, and New York Central, which belong to the rate associations in northern territory. Obviously, a proposal to change such a rate must be concurred

[6] "Appeals" and "Independent Action" are discussed at pp. 46-47 of the REPORT ON RATE-MAKING PROCEDURES.

[7] In 1923 the Commission, recognizing this importance of the conference method to shippers as well as to carriers, said in its report in Trans-Continental Freight Bureau, 77 I.C.C. 252, 278:

"Witnesses for shippers as well as for respondents testified that the bureau's method of advising shippers of proposed tariff changes was of great value to them, and that the bureau procedure providing for presentation to the standing rate committee, either orally or in writing, of shippers' views before that committee makes its recommendation, gives them an opportunity to show the effect that a proposed rate change would have upon them and thereby prevent any undue advantage to a competitor. This procedure provides for an interchange of views which usually leads to rates satisfactory to shippers, and thus removes occasion for their suspension when published, and for the resulting expenses to both shippers and carriers of formally presenting the case before us."

See also pp. 260, 271, 277. This report summarizes the facts found and conclusions reached by the Commission after investigation, pursuant to SEN. RES. No. 194, 67th Cong., 2d Sess. (1921), of the operations of the Trans-Continental Freight Bureau. The Bureau, similar in organization, procedure, and functions to most rate bureaus, was found to promote economy and efficiency, to be of advantage to shippers and carriers, and to fill the need for group consideration of proposed rate changes (77 I.C.C. 252, 279). The proceeding was dismissed, without dissent.

See also: REPORT ON RATE-MAKING PROCEDURES, at 85, where the Board of Investigation and Research records its conclusion that rate bureaus and conferences "serve a purpose that is necessary to the conduct of the business and to the public regulation of carriers"; Smith, *Rate-Making and the Anti-Trust Law*, 12 I. C. C. PRACT. J. 1117, 1125, 1127 (1944-45).

[8] See "Interterritorial Rate-Making," REPORT ON RATE-MAKING PROCEDURES, 47-50. Some rate bureaus deal solely with interterritorial rate adjustments.

in by both the southern and northern participating connections—neither is entitled to compel the other to accept the new rate. The proposal is, therefore, discussed in the associations of both territories. If the original proponent is one of the southern connections, it submits the proposal in the first instance for consideration in the Southern Association, after which it is sent for consideration by the northern connections through one or more of the northern associations. Here also there is complete right of independent action, and if a southern proponent of a joint through rate to a northern destination can obtain the necessary concurrence of a northern connection reaching that point, the rate can be at once filed with the Commission on behalf of these two railroads, if they so desire, without regard for the attitude of any other southern or northern road, and without the necessity of waiting for their concurrence if they do not choose to give it. However, for reasons that will be explained later, independent action in such a case would be practically certain to precipitate litigation before the Commission.

Almost all the proposals submitted for discussion in the rate associations are for rate reductions.[9] This is inevitable, as rate increases are now almost entirely confined to those which result from decisions of the Commission in so-called "general rate cases." Of the proposals for rate reductions which are considered in the conferences, all but a small percentage are ultimately made effective in filed tariffs. Where the proposals involve joint through rates which must be participated in by connecting carriers in two separate rate territories, the number which fail to be made effective is somewhat greater and runs in the neighborhood of 15 per cent. In these cases there is, of course, always the opportunity, as in the case of all rate proposals, for any shipper or railroad dissatisfied with the result to take the matter before the Commission on its own initiative and obtain the proposed reduction by Commission order, if the Commission regards the existing rate as too high or as in any way unreasonable or discriminatory.

Sometimes, where an existing rate adjustment which would be affected by a rate proposal is so complicated and widespread that the proposal cannot be satisfactorily handled between the rate associations of two or more territories by correspondence, a special conference of the railroads in the different territories is held to consider the series of changes which the proposal would entail. Such conferences are *ad hoc* affairs and are called from time to time when proposals are made which would require extensive changes in the interterritorial rates on such important articles of traffic as citrus friut, iron and steel, textiles, chemicals, paper, and the like, which are produced and marketed in a number of different sections of the country. In these *ad hoc* conferences, as in the regular association committees, each railroad preserves its full right of independent action, and the railroads of one rate territory are not bound by the decisions of those of another territory, although, of course, neither can compel the other to concur in any proposal. In recent years the mechan-

[9] For example, see the statistics set forth in Trans-Continental Freight Bureau, cited *supra*, note 7, at 271.

ical details of these *ad hoc* conferences have generally been arranged through the Association of American Railroads, one of whose officers, after consultation with the interested parties, sets the date and place of the meeting, sends out the notices, and distributes the minutes. In general, the Association itself is not and has never been a forum for the consideration of rate matters. In only three instances during a period of twelve years has the Association's Board of Directors expressed itself with respect to any particular rates, and in two of those instances the roads involved promptly took independent action at variance with the Association's recommendation.[10]

Beginning in 1928, the Interstate Commerce Commission called on the railroads of the different rate territories to make wholesale readjustments in the interterritorial rates on a large number of commodity groups.[11] This necessitated such constant conferences and negotiations between the connecting lines in the different territories, whose participation in the new rates was necessary, that a more or less permanent machinery for the conduct of such conferences was set up to last until the task should be completed. This was the so-called "Joint Conference of Contact Committees,"[12] consisting of representatives of the railroads in the different rate territories, which met periodically and took up, one after another, the commodity groups covered by the Commission's orders. In these conferences, as in the special conferences mentioned above, each railroad preserved, and frequently exercised, its right of independent action, and the railroads of one rate territory were not in any way bound by the votes of those in other territories.

It is apparent from this review that neither the territorial rate associations nor the interterritorial conferences fix or otherwise determine the rates which are to be filed by any railroad with the Interstate Commerce Commission, nor do they have any power to prevent a rate from being filed if the railroad or railroads over whose rails the rate is to apply decide to file it. The conferences embody no agreement on the part of the member roads to charge any particular rates, or to abide by any rates, or to refrain from changing any rates. The territorial associations are simply clearing houses through which notice of rate proposals is given and orderly consideration accorded to them by the interested shippers and railroads.[13] The interterritorial conferences serve the same purpose with respect to the broader rate adjustments in which the railroads and shippers of several sections of the country are involved. The con-

[10] REPORT ON RATE-MAKING PROCEDURES, at p. 28, includes a specific statement of A.A.R. activities. The three exceptional instances of A.A.R. action concerning rates were:

(1) Resolution of December 18, 1936, concerning rates on copper bullion, ignored by independent action of the Denver & Rio Grande Railroad and the Western Pacific Railroad;

(2) Resolution of January 18, 1935, concerning rates on grain, ignored by independent action of southern railroads;

(3) Resolution of October 30, 1936, concerning rates on citrus fruit.

[11] Southern Class Rate Investigation, 100 I.C.C. 513 (1925), order becoming effective Jan. 15, 1928; Rates, from, to, and between Points in Southern Territory, 191 I.C.C. 507 (1933).

[12] REPORT ON RATE-MAKING PROCEDURES, cited *supra*, note 5, at 49.

[13] Trans-Continental Freight Bureau, 77 I.C.C. 252, 260-261, 270, 278 (1923); REPORT ON RATE-MAKING PROCEDURES, cited *supra*, note 5, at 28, 46-47; Smith, *loc. cit. supra*, note 7, at 1125-1127.

ferences do not enable some railroads, or any railroad, to veto the rates charged or proposed to be charged by another, except, of course, that a road which wishes to change a joint through rate participated in by a connecting line or lines cannot make the change effective if its connections are unwilling. This would be true whether the rate conferences existed or not.

The function and value of the rate conferences is to develop information and afford opportunity for discussion. As will be explained later on, such information and discussion are needed, because practically every railroad in a given rate territory is to some extent a partner with every other in joint through rates, and this is even more true with respect to the railroads in adjacent territories. If a rate reduction is proposed which would apply only on certain railroads or over a particular route, the shippers located on those railroads or on that route would be given an immediate advantage over shippers located on competing routes, contrary to the provisions of the Interstate Commerce Act. Such discrimination would at once give the disadvantaged shippers a cause of action before the Interstate Commerce Commission. It therefore becomes essential for a railroad, before putting a new rate into effect, to know whether it would give rise to such a charge of discrimination in order to determine whether to carry out the proposal, or so modify and extend it as to remove the objections. Generally no single railroad is in a position to have at its disposal all the necessary factual data for a determination of these questions, such as information concerning the location of industries, the markets reached by shippers on competing lines, and the like. It is the function of the rate conferences to develop such information for the benefit of all their members and to provide a forum for the discussion of proposals in the light of such information.

In some instances the discussion among the railroads which goes on through the rate conferences may lead a railroad which has proposed a rate reduction to take a different view of the matter from that which it took before it had all the facts at its disposal; while in other instances the information made available may eliminate opposition to the reduction on the part of those who were at first opposed to it. Discussion and enlightenment may work either way, and there can be no doubt that in some instances a reduced rate, which would have been filed in a tariff with the Commission but for the discussions in the conferences, is not filed after that discussion has taken place. However, as stated above, any shipper or railroad which is dissatisfied with such a result can bring the matter at once before the Commission for its determination.

Because of the full and complete right of independent action which exists in the rate associations and conferences; because of the power of the Interstate Commerce Commission to correct rate inequities and protect the public generally and particular shippers from unreasonable and discriminatory rates; and finally because the discussions in the conferences have been regarded as practically indispensable in assisting the railroads to conform their rates to the detailed requirements of the Interstate Commerce Act, as will hereafter be explained, it was for long not supposed that the

rate conferences and associations involved any violation of the antitrust laws. Within the last few years a contrary view has emerged, and has not only found reiterated expression in many books, articles, and speeches emanating from persons connected with the Antitrust Division of the United States Department of Justice,[14] but has also been interjected into antitrust suits brought purportedly on other grounds. This view appears to rest on two underlying conceptions. The first is the abstract and formal one that under the antitrust laws any discussion or exchange of views and information between competitors about prices, before putting those prices into effect, is *per se* prohibited, and that this prohibition extends to the railroads in spite of the obvious fundamental differences between railroad rates, under a system of regulation, and unregulated prices in the manufacturing and commercial industries. The second basis for the view appears to be a conception that shippers are lawfully entitled to anything which will bring about a rate reduction for their benefit below the rates fixed as reasonable by the Interstate Commerce Commission, and that, since in some instances the railroads, after discussion and consultation through the conferences, fail to put into effect proposed reductions, the conferences are thereby rendered unlawful as depriving shippers of something to which they are by law entitled. The general question of whether conference and discussion among the railroads before filing their rates with the Interstate Commerce Commission is a violation of the antitrust laws will now be discussed.

II

Solely for the purpose of the present argument, it may be conceded that in an unregulated commercial industry, like those engaged in the production and distribution of oil, automobiles, tobacco, fertilizer, and the like, any discussion between competitors in advance of prospective price changes, even though not accompanied by an agreement upon prices, or any other form of "price-fixing," might conceivably be held to constitute an unlawful interference with the kind and degree of free competition in those industries which is required by the antitrust laws. In the light of the decisions up to this time, it is not believed that there is any general rule of antitrust law which, apart from special circumstances, would require this result.[15] However, that is not the question here. Here the question is whether, assuming that such might be the rule of law for the unregulated industries in question, the same legal result must necessarily follow, or can reasonably be held to follow, for an industry like the railroad industry, whose prices, or "rates," are subject to the degree and

[14] For example, see: publications of Berge, Wiprud and Dumbauld, cited *supra*, note 1; numerous speeches of Thurman W. Arnold, such as those reprinted in REP. PROC. GA. BAR ASS'N 135-152 (1941); 12 MISS. L. J. 579-588 (1940); 12 MO. B. J. 174-178 (1941); Arnold's introduction to WIPRUD, JUSTICE IN TRANSPORTATION (1945); statements of Messrs. Arnold, Wiprud, and other representatives of the Division in *Hearings before the Senate Committee on Interstate Commerce on S. 942*, 78th Cong., 1st Sess. 5, 69, 89, 97, 123, 177, 182, 203, 213, 241, 287, 353, 454, 458, 461, 470, 511, 535, 584, 651, 770, 781 (1943).

[15] Thus, in the Sugar Institute case, the Supreme Court held that it was not unlawful for competitors to exchange information as to future prices so long as there was no agreement to adhere to such prices. Sugar Institute v. United States, 297 U. S. 553, 603 (1936).

kind of regulation imposed on them by the provisions of the Act to Regulate Commerce. In other words, the question is whether railroad rates, which are subject to all the legal requirements and restrictions of the Interstate Commerce Act, that do not apply to unregulated industrial prices, are at the same time also subject to all the requirements with respect to prices which are imposed on the unregulated industries by the antitrust laws.

There is no doubt that the railroads do not enjoy any general immunity from the prohibitions of the antitrust laws.[16] However, on the particular point here under discussion, the question is the narrower one of whether the antitrust laws impose exactly the same prohibitions with respect to conferences about railroad rates that they do, or might be held to, impose with respect to prices in industries not subject to a comprehensive Congressional system of rate regulation. It is well settled that the antitrust laws do not impose a code of identical prohibitions against exactly the same acts in all situations and circumstances. What the antitrust laws do or do not prohibit is generally dependent on surrounding facts. As the Supreme Court has said, "A close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. . . . The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions."[17]

In this connection it is further to be noted that one of the most important surrounding facts relating to the railroad industry is that it is subject to the Interstate Commerce Act. Where an industry like the railroads is subject not only to the antitrust laws, but also to the Interstate Commerce Act, the provisions of the antitrust laws in their application to the railroads must obviously be given such construction as not to be inconsistent with the requirements of the Interstate Commerce Act, and not to defeat the latter. The two statutes must be read together, and each so construed that its requirements will not have the effect of destroying the other, nor of making compliance with its specific terms and provisions impossible or impracticable. There can be no doubt that it is the Interstate Commerce Act in which Congress has specifically embodied its policy and scheme of regulation for the railroads. The provisions of that Act are at once detailed and comprehensive, and it is not to be supposed that Congress intended that those provisions, most of which have been enacted long since the date of the Sherman Act, should be overridden, superseded, or defeated by the construction given to the extremely broad and vague language of an earlier statute, as construed in cases dealing with private industries for which Congress has provided no such scheme of regulation as it has established for railroad rates.[18]

[16] United States v. Trans-Missouri Freight Association, 166 U. S. 290 (1897); United States v. Joint Traffic Association, 171 U. S. 505 (1898); Terminal Warehouse v. Pennsylvania R. R., 297 U. S. 500, 515-516 (1936); Georgia v. Pennsylvania R. R., 324 U. S. 439, 456, 457, 458, 462-463 (1945).

[17] Appalachian Coals, Inc. v. United States, 288 U. S. 344, 360-361 (1933). See also Maple Flooring Association v. United States, 268 U. S. 563, 579 (1925); Sugar Institute v. United States, 297 U. S. 553, 597, 600 (1936).

[18] McLean Trucking Co. v. United States, 321 U. S. 67, 79, 83-84 (1944).

Accordingly, in determining whether a prohibition imposed by the antitrust laws with respect to prices in unregulated industries is intended by Congress to apply also to the railroads, whose rates are regulated by the detailed requirements of the Interstate Commerce Act, it is essential to determine: (1) whether the reason for that prohibition, and the policy on which it is founded, exist where a comprehensive Congressional scheme of rate regulation is present, or on the contrary are incompatible with the regulatory scheme or with the policy which it embodies; and (2) whether the application of the prohibitions in question to the railroad industry would impair effective compliance with the specific requirements of the Interstate Commerce Act.

On the first of the foregoing points it is relevant to inquire whether the Interstate Commerce Act indicates a Congressional policy with respect to competition in railroad rates different from the policy embodied in the antitrust laws with respect to price competition in unregulated industries. If in the latter industries the Sherman Act should be held to prohibit all discussions about prices among competitors, this prohibition, since it is not expressly stated in the language of the Act, but proceeds only from construction, cannot be assumed to flow from arbitrary considerations, but must have its source in some policy and purpose supposed to be embodied in the statute. This policy and purpose must therefore be examined to determine whether it is identical or consistent with the policy and purpose embodied in the Interstate Commerce Act with respect to competition in railroad rates.

If the Sherman Act is to be construed as prohibiting all discussions about prices among competitors, the supposed Congressional policy on which such a construction would have to be founded is that which the Supreme Court has expressed in condemning under the Act "any combination that tampers with price structures."[19] This supposed policy of the Sherman Act is that, for the protection of the public against unduly high prices, prices must be made solely by the free and unhampered operation of competitive forces, and anything which prevents prices from being solely the resultant of these forces must therefore be regarded as prohibited. Does the Interstate Commerce Act indicate, or is it consistent with the view, that in the railroad industry Congress has adopted the same policy of requiring that railroad rates shall be made solely by the free and unhampered operation of competitive forces?

In explaining this supposed policy of the Sherman Act with respect to the unregulated industries, the Supreme Court, speaking through Mr. Justice Stone, in its opinion in the *Trenton Potteries* case,[20] found as a reason for the policy that there is no way to determine that a price is reasonable for the public except by the fact that it results from the unfettered operation of competition, since there is no way in which a court can satisfactorily determine for itself the intrinsic reasonableness of a price. It is at once obvious that this reason for the rule can have no application to railroad rates, since Congress has expressly provided a method for determining the reasonableness

[19] United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 221 (1940).
[20] United States v. Trenton Potteries, 273 U. S. 392, 396, 398 (1927).

of such rates by setting up the Interstate Commerce Commission to make such determinations. In other words, in the case of railroad rates Congress has not provided that reasonableness is to be determined according to whether or not they have been produced by the free operation of competitive forces. On the contrary, Congress has substituted for competition another and different method to provide the public with reasonable railroad rates. It has here substituted the judgment of an expert body for the operation of competition as the test and protection of rate reasonableness. To this extent Congress itself has directly interfered with, and limited, the free operation of competition in the field of railroad rates. Accordingly, in so far as competition in rates is permitted by law to operate, it is evident at the outset that in a most important respect it is only a limited and restricted kind of competition.

The most cursory inspection of the Act to Regulate Commerce discloses that by numerous provisions of that Act the free operation of competition in railroad rates is restricted in other important ways:

First, by the requirement of the Act that railroad rates must be "reasonable" as found by the Commission, such rates are prevented from rising to the level to which they might, and certainly would at times, be driven by the forces of free competition. Under free competition, prices must, and will at times, rise to levels of very high profits in order to counterbalance other periods of depressed prices, which have the effect of causing marginal producers to close down operations, if not actually go out of business.

Second, the Interstate Commerce Act expressly provides that railroad rates, to satisfy the statutory standard of reasonableness, must be adequate to provide the railroads with sufficient revenue to enable them to perform an efficient national transportation service.[21] This standard of rate reasonableness is inconsistent with the philosophy of free competition as a regulator of prices. Under that philosophy, it is the normal expectation that prices will at times be driven down to very depressed levels, which will force many plants out of business and cause them to be dismantled,[22] thus reducing the number of competitors for the time being and bringing about an increase in prices, perhaps to unduly high levels, which will attract new units into the business. The object of the Interstate Commerce Act is to protect the national transportation plant for the service of the public and preserve its com-

[21] Section 15a(2) of the Act is as follows: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to . . . the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." 41 STAT. 488 (1920), as amended, 49 U. S. C. §15a(2) (1940).

[22] *Cf.* CLAIR WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 2 (TNEC Monograph 21, 1940): "Investment must be speedily withdrawn from unsuccessful undertakings and transferred to those that promise a profit. . . . There must be no obstacle to elimination from the market; bankruptcy must be permitted to destroy those who lack the strength to survive." Again, "Failure in business curtails the supply of unwanted goods." *Id.* at 13.

ponent railroads as going concerns.[23] To this end the standard of rate reasonableness provided by the Act excludes not only those rate reductions which would cause the rails of necessary transportation lines to be torn up, but also those which would make it difficult or impossible to obtain additional increments of needed capital.

Third, the provisions of the Interstate Commerce Act depart from the basic philosophy of free competition in prescribing as a rule of law complete rate equality between all persons and places similarly situated. Further to enforce this equality, the Act requires that rate changes shall go into effect only after published notice and a waiting period of thirty days,[24] so that one customer may not be benefited by a rate reduction which could be immediately withdrawn so as to deprive other customers of the opportunity to take advantage of it. This kind of over-all equality in rates for all purchasers of railroad service who are similarly situated would not be produced by the operation of free competition, but is in fact inconsistent with, and contrary to, the results that free competition is relied on to bring about.[25] Just as the free play of competitive forces operates by successive swings between destructively low prices and prices which yield high profits, so it operates through charging different prices to different customers for competitive reasons. This is not permitted under the Interstate Commerce Act.

Fourth, the Interstate Commerce Act requires the establishment and maintenance of such relationships between the rates to and from different places as to prevent unjust inequality of opportunity for different shippers seeking to reach the same markets. In other words, under the Act, the rates which may lawfully be charged to a user of the service located at one point must bear such a relationship to the rates charged to users elsewhere that, after taking into account legitimate differences in transportation conditions as found by the Commission, neither group of users will be unfairly advantaged or prejudiced as compared with the other.[26] This again is a result wholly different from that which the free operation of competitive forces would bring about, or is in theory expected to bring about. Under free com-

[23] In the railroad industry there is no such thing as withdrawal of capital or abandonment of the field in the sense in which those opportunities exist in an unregulated industry. Under section 1(18) of the Interstate Commerce Act, no carrier may abandon all, or any portion, of a line of railroad, or the operation thereof, without having first obtained from the Interstate Commerce Commission a certificate of public convenience and necessity authorizing the abandonment. 24 STAT. 379 (1887), as amended, 49 U. S. C. §1(18) (1940). Under section 1(20), any abandonment without such certificate is made punishable by fine of not more than $5,000, or imprisonment for not more than three years, or both. 24 STAT. 379 (1887), as amended, 49 U. S. C. §1(20) (1940).

[24] Such an arrangement for advance publication of future rates and adherence thereto, which in the case of the railroads is required by law, is precisely the kind of arrangement that is illegal under the antitrust laws in an unregulated industry. See United States v. American Oil Co., 262 U. S. 371 (1923); Sugar Institute v. United States, 297 U. S. 553, 601 (1936).

[25] EDWIN R. A. SELIGMAN, PRINCIPLES OF ECONOMICS 150 (1914): "The very essence of usual business practice is this system of different prices to different customers." See also Fly, *Observations on the Antitrust Laws, Economic Theory and the Sugar Institute Decisions,* 45 YALE L. J. 1339, 1347 (1946).

[26] "To upset or seriously to menace a general rate structure lawfully established suffices to make proposed rates calculated to effect such a disruption unreasonable and unlawful." Trunk-Line and Ex-Lake Iron Ore Rates, 69 I.C.C. 589 (1922). See also Grain and Grain Products, 115 I.C.C. 153 (1926); Ex-Ohio River Coal to Ohio Points, 185 I.C.C. 211 (1932).

petition the seller of a commodity or service, in making prices to his different customers, is not required or expected to take into account anything but what will result in immediately attracting to him the largest volume of business, irrespective of the effects on the comparative positions of his customers among themselves.

Fifth, the Interstate Commerce Act prohibits railroads from discriminating between their different connections.[27] The problem of connecting lines, as it exists in the railroad industry, is something that has no parallel in the manufacturing or marketing industries. In the latter industries, one concern is not necessarily and mechanically dependent on another to complete its service. It can get its goods into the hands of its customers directly or through an intermediary of its own choosing, or, if it so desires, can refrain altogether from serving customers at any particular place or in any section of the country. This is not true of a railroad. It cannot limit its service to its own line. It must be prepared to accept shipments to points which can be reached only over the rails of other railroads. So-called through routes and joint rates are thus necessary, and in performing such joint service each road is dependent upon the cooperation of its connections. There is the added peculiarity that two roads may stand in the position of competitors and connections at the same time. Thus the Baltimore & Ohio and the Louisville & Nashville are competitors between St. Louis and Cincinnati while they are connections with respect to traffic between St. Louis and points south of Cincinnati. Under the Interstate Commerce Act a railroad is not free to limit itself to a particular connection, as a manufacturer is free to choose a particular distributor of his products. The Pennsylvania must connect at Chicago with all the different railroads extending westward from that point to the Pacific Coast, and each of those railroads must, in turn, connect at Chicago not only with the Pennsylvania, but also with all of its competitors in the East. The Interstate Commerce Act embodies in its requirements the philosophy of a national transportation system.[28] It provides that a railroad must open its rails to business from all its connections equally, including those which are its own competitors as well as those which are not. Thus the railroads constantly find themselves in the position of having to negotiate rates with their competitors, and these rates must all be equal between the same points of origin and destination.

Sixth, as an added means of insuring that each railroad will treat its connections equally, and thereby promote the free functioning of a national transportation system of separate roads, the Interstate Commerce Act expressly provides that in the case of

[27] This prohibition is contained in section 3(4) of the Act. 24 STAT. 380 (1887), as amended, 49 U. S. C. §3(4) (1940).

[28] "The railroads of the country constitute a connecting and interlacing system of lines over which freight cars of all ownerships circulate freely. . . ." Testimony of the Honorable Joseph B. Eastman, in *Hearings before the Senate Committee on Interstate Commerce on S. 942,* 78th Cong., 1st Sess. 830 (1943). "Today it is recognized that the railroads of the country together form a single transportation system. Joint operations are on the whole of more importance than local operations. Trains or cars move freely from one railroad to another, and through routes and joint rates exist in multitudinous quantity. However, the single system is still made up of a large number of parts which are separately owned and managed. . . ." The Honorable Joseph B. Eastman, in FIRST REPORT OF THE COORDINATOR OF TRANSPORTATION, SEN. DOC. No. 119, 73rd Cong., 2d Sess. 8 (1934).

through routes the shipper, and not the originating railroad, is entitled to designate the connections over which the shipment shall reach its destination.[29] To this end, all through routes are available to shippers to choose from, and a through route may not be closed over the protest of a shipper without the permission of the Commission.[30] This requirement, as well as those of equal treatment between connections, carries with it the necessary consequence that rates over all routes between the same points must be equal,[31] since the charging of a higher rate over any route would be a practical method of closing that route to the shippers who desire to use it. Accordingly, a railroad desiring to change a rate over one of the through routes in which it participates must assure itself that the change can be effected over the other through routes between the same or related points to which it is likewise a party, since if it did not do so, it might find itself in the position of either closing a through route or discriminating against a connection and thereby violating the Act.

It is perfectly obvious that never in a million chances would the blind interplay of competitive forces succeed in producing a rate that met all these requirements of law.[32] There seems to be a conception in certain quarters, including the Department of Justice, that all that the Interstate Commerce Act requires is that rates shall be at, or below, the reasonable maximum set by the Commission in its rate orders, and that beneath that level rates are supposed to stand at any point to which they may be driven by the operation of free and unhampered competition among the railroads in an effort to take business from one another.

This might be so if the only provision contained in the Act were that which empowers the Commission to set reasonable maximum rates and provides a penalty for disobedience to its orders. This, however, is only one among the many statutory provisions to which railroad rates are required to conform. The other and additional requirements summarized in the preceding paragraphs show that to meet all those requirements rates almost always have to stand at a different point from that which would be the resultant of the free and unhampered operation of competitive forces.

[29] Interstate Commerce Act, section 15(9) and section 15(10). 24 STAT. 384 (1887), as amended, 49 U. S. C. §§15(9) and 15(10) (1940).

[30] Interstate Commerce Act, section 15(3), 24 STAT. 384 (1887), as amended, 49 U. S. C. §15(3) (1940).

[31] See the statement of the late Joseph B. Eastman in *Hearings before the Senate Committee on Interstate Commerce on S. 942*, 78th Cong., 1st Sess. 830 (1943): "It is also true that there is a great interdependence between rates. Where there is more than one route between two points, as a practical matter the rates must ordinarily be the same over all the routes. Even in the case of rates from widely separated origins to a common market, a change in one of the rates may impel changes in them all. A change in the rate basis on one commodity between certain points may even force changes in the rates on other commodities between different points."

[32] The fact that a railroad set a rate at a particular point for competitive reasons is no defense to the charge that the railroad has violated the Act by publishing a rate which under some provision of the Act is unreasonable or unduly prejudicial. United States v. Illinois Central R. R., 263 U. S. 515, 525 (1924). See also Interstate Commerce Commission v. Inland Waterways Corporation, 319 U. S. 671, 685 (1943). In United States v. Chicago, M., St. P. & P. Ry., 294 U. S. 499, 506 (1935), the Supreme Court, in referring to the limits upon a carrier's freedom of action in fixing its rates, specifically mentioned avoiding "rivalry so keen as to be a menace to the steady and efficient service called for by the statute," and cited section 15a of the Act as the source of this particular restriction.

If, beneath the reasonable maximum level set by the Commission's orders, rates were fixed solely by blind competition among the railroads for business, practically every rate so fixed would violate the Interstate Commerce Act in one or another important particular, and would therefore lead directly to a litigated case before the Commission, brought by some injured party to enforce his rights under the Act. Such a case would begin with a suspension of the rate, followed by long drawn-out legal proceedings to the discomfiture and expense of all parties concerned.

It is therefore plain that Congress, by its enactment of the detailed provisions respecting rates which are now a part of the Interstate Commerce Act, has not intended that ordinary commercial competition shall operate freely in the making of railroad rates. Instead it has substituted a list of statutory standards to which the railroads are required to conform in making their rates, and has empowered the Commission to police the application of these standards to prevent violations. These standards are in the first instance made binding by the Act upon the railroads themselves, which are supposed to do what they can to comply with them, just as individuals generally are supposed to make an effort to obey the law; while the Commission, as the policing agency, to avoid being swamped, is expected to have to deal only with the relatively exceptional cases of violation.[33] From this it follows as a necessary consequence that Congress does not intend that the railroads in filing their rates with the Commission shall be guided by the purely competitive considerations which the antitrust laws require of sellers in an unregulated commercial industry. It is furthermore plain that Congress has not only not adopted the policy of requiring that railroad rates shall be made solely by the free and unhampered operation of competitive forces, but has instead prescribed standards for such rates which cannot be satisfied by rates that are made solely as the result of competition.

In the light of this obvious and necessary conclusion, we are now in a position to recur to the question, raised at an earlier point in this paper, as to whether the

[33] Some of the positions expressed by the Department of Justice assume that the railroads are not free to confine their competition by their own acts within the limits prescribed by the Interstate Commerce Act, but must in all instances wait to be compelled to do so by specific orders of the Commission. This is directly at variance with several provisions of the Act, and more specifically section 8, which is as follows: "In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter." 24 STAT. 382 (1887), as amended, 49 U. S. C. §8 (1940). Thus, in the absence of an order of the Interstate Commerce Commission, a railroad may incur liability under this section by changing a rate in a way that violates some applicable provision of the statute. Baer Bros. v. Denver & R. G. R. R., 233 U. S. 479 (1914); Louisville & N. R. R. v. Sloss-Sheffield Co., 269 U. S. 217 (1925). Accordingly, Chairman Aitchison, in testifying before the Committee on Interstate Commerce of the United States Senate, has said: "If in the initiation of any rate or charge the carrier's judgment as to what is just and reasonable, or as to what is a nondiscriminatory or nonpreferential practice proves to be wrong when tested in subsequent proceedings before the Commission, it is liable for the full amount of the damages suffered. . . ." *Hearings before the Senate Committee on Interstate Commerce on H. R. 2536*, 79th Cong., 2d Sess. 1197 (1946). The Commission has, therefore, held that when carriers initiate rates they must apply the same standards that are applied by the Interstate Commerce Commission when it is subsequently called upon to pass upon the legality of the rates. Anadarko Cotton Oil Co. v. Atchison, T. & S. F. Ry., 20 I.C.C. 43 (1910).

policy of Congress with respect to railroad rates is the same as that which, in the application of the Sherman Act to unregulated industries, might be held to prohibit all discussions and conferences among competitors about prices. It was there pointed out that such a prohibition could be derived only from a supposed policy that prices must be made solely by the free and unhampered operation of competitive forces, and that anything which prevents prices from being solely the resultant of those forces must therefore be regarded as prohibited. It is now clear, in the light of the specific Congressional enactments with respect to railroad rates, that Congress has expressly repudiated that policy with respect to such rates and has substituted an entirely different one. Since the application of the Sherman Act to a particular industry must, under the universally accepted rule of construction, take account of the relevant facts peculiar to the industry and the Congressional intent with respect thereto, there remains no basis for holding that the Sherman Act in its application to the railroad industry must be construed or can properly be construed to prohibit conferences and discussions between railroads concerning rates.

III

The problem with respect to rates which confronts the railroads under the Interstate Commerce Act is how to make rates which will conform to the statutory standards. We have just seen that in the light of those standards it is clear that Congress does not intend railroad rates to be made by the free play of competitive forces, and that accordingly there is no basis for holding that consultation and conference in the making of railroad rates are prohibited by the Sherman Act. On the contrary, the requirements with respect to rates which are imposed by the Interstate Commerce Act are such that the railroads can comply with them only by conscious, deliberate effort. In this effort consultation and conference are necessary as a practical matter. In view of the nature of the rate standards established by the Act, and in view of the peculiarity of the railroad industry—that it consists of an interlaced nationwide physical plant owned and operated by many different companies, but made up of a network of joint through routes—it seems clear that in countless instances compliance with the rate standards of the Act is possible only after joint consideration and discussion by many different carriers concerning the course of action which they will take with respect to rate proposals. This conclusion was clearly and strongly expressed by the late Commissioner Eastman in the following words:

> I do not know how the carriers can comply with the mandates of the law and the orders of the Commission unless they consult and confer with each other. . . . It must be evident to any reasonable man that the carriers cannot respond to all the duties imposed by law if each carrier acts in a vacuum. It is a situation, under all the conditions, which plainly calls for consultation, conference, and organization and for many acts of a joint or cooperative character.[84]

[84] *Hearings before the Senate Committee on Interstate Commerce on S. 942*, 78th Cong., 1st Sess. 878, 831 (1943).

It would be impractical, for lack of the necessary space, to illustrate this conclusion by reference to all the different types of rate proposals and rate relationships to which it applies. It is, however, desirable and important to point out the necessity for conferences between all the competing railroads in one rate territory and all the competing railroads in another territory whenever a proposal is made for a rate change between a point in one territory and a point in the other that are linked together by joint through routes in which all or most of the railroads in each territory participate. An illustration of this necessity is afforded by considering a proposal to reduce a joint through interterritorial rate from a point in the South like Atlanta to a northern destination like Buffalo. This illustration will show why the consideration of such a proposal by rate conferences consisting of all the railroads in the North and in the South is indispensable. It will at the same time disclose the confusion to which the prohibition of such conferences would lead, without conferring any compensating benefit on either shippers or the public.

Let us suppose, then, that the Southern Railway wishes to propose a reduction in the joint through rate on an article from Atlanta to Buffalo. Under the present practice the proposal is reviewed by all the southern railroads in their association to determine whether they will all join in it, and is then given similar joint consideration in the association of the northern roads. What would be the result if this practice had to be abandoned and each road had to negotiate rate changes separately with each of its individual connections? If the rate conferences were abolished and the latter method adopted, the Southern would have to confer in the first instance with a single northern connection, say the Pennsylvania, to secure its concurrence in the proposed rate. Assuming that the latter were willing to concur, the Southern would then file with the Commission the new rate for account of itself and the Pennsylvania, and the tariff would be published on the usual statutory notice of thirty days. Within a few days after such publication, this action would doubtless come to the attention of other interested railroads and shippers. Thereupon, the Baltimore & Ohio, for the protection of consignees located on its rails at Buffalo, would undoubtedly demand that the Southern agree to publish the same rate to Buffalo over its through route with the Baltimore & Ohio north of Potomac Yard, in order to comply with that provision of section 3 of the Interstate Commerce Act which prohibits a railroad from discriminating between connections. Also, the Baltimore & Ohio would undoubtedly insist that the rate via its line should be published so as to become effective not later than the same effective date as that designated for the rate filed in connection with the Pennsylvania, on the ground that otherwise consignees on its line at Buffalo would be discriminated against. Since, however, some time would have already elapsed since the original publication of the tariff by the Southern and the Pennsylvania, it would not be in the power of the Southern to bring about this equality of effective date. Application would therefore have to be made to the Commission to grant what is called "special short-term permission" for the new rate over the Baltimore & Ohio.

If it be assumed, as would almost certainly be the case, that other shippers of similar articles at Atlanta were located at that point on the rails of the Seaboard and the Atlantic Coast Line, and would insist on their right under the Act to be kept on a rate parity with Atlanta shippers located on the Southern, then the Seaboard and the Coast Line would each separately have to approach first the Pennsylvania and afterwards the Baltimore & Ohio, requesting that each of the latter lines join in making the new rate available over the routes of the Coast Line and the Seaboard to the junction of the latter with the northern roads at Potomac Yard.

About this time undoubtedly the New York Central, which has connections with the South at Cincinnati but not at Potomac Yard, would approach the Southern and insist that the latter apply the same rate from Atlanta to Buffalo through the Cincinnati gateway in connection with the New York Central as through the Potomac Yard gateway, in order that the former route might not in effect be closed. This presumably the Southern would be willing to do. This, however, would prompt the Erie, another northern carrier having a line from Cincinnati to Buffalo, to demand a similar rate in connection with the Southern via the Cincinnati gateway.

Pursuing the illustration to its next stage, account must be taken of the fact that probably the Louisville & Nashville also serves an Atlanta shipper or shippers of the article on which the rate is to be reduced, and will naturally desire to protect the right of such shippers to be kept on a parity of rates with other competing Atlanta shippers. Accordingly the Louisville & Nashville, which reaches the Cincinnati gateway, would request the New York Central to join it in establishing the new rate via that gateway to Buffalo. Thereupon the Louisville & Nashville would have to negotiate separately with the Erie, the Baltimore & Ohio, and the Pennsylvania to publish the rate via Cincinnati in connection with each of their own lines from that point to Buffalo.

In the meantime, competing shippers of the same article at Birmingham, Alabama, which is served by the Louisville & Nashville, the Southern, the Seaboard, and the Coast Line, would demand of all these railroads that the rates from Birmingham to Buffalo be proportionately changed so as to preserve their existing relationship with those from Atlanta to Buffalo. To this the Birmingham shippers are entitled under the Act. If the rate conferences were abolished, each of these railroads would have to handle this request separately. If the Louisville & Nashville should conclude to establish the new rate requested from Birmingham to Buffalo, this would also require the Illinois Central to publish the same rate via its northern junctions at Chicago and Indianapolis, and this railroad would therefore have to undertake separately to secure the concurrence of each of its northern connections at these junctions. The northern lines as a group could not consider the request of the Illinois Central together as they now do, but the latter would have to deal separately and successively with the New York Central, the Nickel Plate, the Wabash, the Erie, the Pere Marquette, the Grand Trunk, the Baltimore & Ohio, and the Pennsylvania.

I have mentioned only a few of the many through routes between Atlanta and Buffalo and related points which carriers and shippers would be entitled under the Act to have kept on a rate parity. Even as to this limited number of routes the statutory thirty-day period (between the date when the new rate is first filed over the joint route of the Southern and the Pennsylvania and the date when that tariff would become effective) would leave far too short an interval for all the separate conferences that would have to be held between individual southern and northern connecting lines. Accordingly, since the establishment of the rate over any one route earlier than over another would result in prohibited discrimination against shippers located on the latter route, and might also discriminate against connecting railroads, it would be inevitable that petitions for suspension of the proposed rate would be filed with the Commission in order that the new rates from all related points of origin over all the usual routes might go into effect simultaneously. It would be inevitable that the Commission would grant the suspension and order a hearing. At this hearing, which would be at least thirty days after the suspension, the carriers and shippers would present their respective positions. Probably most of these would not represent any objection to the original proposal, but only insistence that, if the reduction should be made, it should be applied over all existing routes equally, and that corresponding reductions in other rates should likewise be made to preserve existing rate relationships prescribed or approved by the Commission.

The only result of such a procedure would be to bring before the Commission in the form of a litigated case practically every proposal for a rate change between important origins and destinations where any considerable number of through routes are available. This would be the result even if there were no substantial difference of view among railroads and shippers with respect to the proposed change. The litigation would provide the only legitimate means for getting all the interested parties together, which is now accomplished through the rate conferences. Ordinarily all the railroads involved in through routes are willing to join in a proposed change if it is extended to enough points to take care of all the routes in which they are involved, and to give the benefit of the proposed advantage equally to all the interested shippers along their lines. However, it is necessary for them to be in a position to assure themselves, as they now do through the rate conferences, that this will be the case. In such instances litigation before the Commission would be a futile expense and burden upon railroads and shippers alike.

There is of course a relatively small proportion of cases where some or all of the carriers in one or the other of the two rate territories would refuse to concur. Under the present conference method this fact emerges practically at once. The nature and scope of the objections can then be given consideration, with at least the possibility that a way may be found to meet the objections by some modification of the proposal. If the rate-conference method were abolished, and negotiations had to be limited to a series of successive discussions between separate and insulated pairs of connections, none knowing the position taken by the others, it would be

impossible to determine before litigation whether an adjustment could be reached or not. If a southern railroad should be able to obtain a northern partner for a change which it desired in a joint through interterritorial rate to the North, while other northern roads opposed the change, then obviously the latter would go to the Commission and institute a suspension proceeding to protect the existing rates. This is done today wherever the conference procedure fails to produce agreement, and one pair of connections is willing by independent action to make a rate effective which the carriers that participate in competing through routes are unwilling to meet. At present, however, because of the conferences, a railroad does not have to go to the Commission until it is fully convinced of the necessity of doing so, as a result of its knowledge of the position of the other roads acquired through the conference procedure.

If that procedure were abolished and its place taken by a series of successive separate conferences between connections, a road would generally go to the Commission without fully knowing the position of the other roads that it was challenging, and might well find after the proceeding before the Commission had commenced that the controversy could be settled by a relatively minor change in the scope of the proposal. The conference procedure affords a method for making such mutual understanding possible in advance, and for working out solutions on which the parties can agree without the necessity of resorting to litigation. If the conferences should be abolished as unlawful, the result would be that wherever several joint routes existed, practically all adjustments of rates over any one of these would have to be worked out as a part of, and in the course of, litigation. From this no real advantage would result, but on the contrary the outcome could only be complication, delay, and expense for all concerned. Under the present method, the time and effort of the Commission are saved for cases where its services are really needed because the parties themselves cannot work out solutions for their conflicting claims. At the same time, it seems unnecessary to add that, under the conference method as it exists today, any shipper who is dissatisfied by failure to obtain a rate reduction which he desires is always free to take his case to the Commission, and the conferences are thus never able to deprive any shipper of the reasonable and nondiscriminatory rates to which he is entitled by law.

It is apparent from the foregoing review of a practical case such as occurs almost daily in the field of rate proposals that interterritorial rates between points in two different rate territories cannot be practically or promptly made or changed without consultation among all of the competing railroads in each of the two territories. This is because each railroad in one territory is a partner of all the competing roads in the adjacent territory, and is not allowed to treat them differently. Accordingly, a southern road which is a partner of all the northern roads must, before putting into effect a joint rate with any one of them, find out the postion of the others. To attempt to do this separately rather than through a single conference would introduce wholly futile and useless complications into the process. In the same way each

northern railroad is a partner of all the southern competing lines, and must, before putting into effect a rate with any one of them, inform itself as to the position of the others. The only practical and convenient way of effecting these interchanges is through the rate associations of the two territories. If each railroad in one territory could only deal one at a time with those in the other territory, it would be impossible ever to agree upon joint through interterritorial rates which would meet the statutory standards; all such rates would have to be established through the cumbrous and expensive processes of litigation.

IV

A suspicion has been created by those opposed to the rate conferences that somehow, if all the railroads in one rate territory are permitted to confer simultaneously with all their connections in another territory in the manner described above, such consultation necessarily produces discrimination against the territory of a railroad which proposes a rate reduction. This is the ground on which it is suggested that Georgia and the South have an interest in demanding that the rate conferences should be outlawed under the antitrust laws. The argument is that if all the railroads in one rate territory, *e.g.*, the North, are permitted to consider together a proposal for a rate reduction received by them from one or more of their connections in another territory, *e.g.*, the South, the former will be more likely to find reasons for refusing to concur in the proposed reduction than if each northern road were compelled to reach its decision separately and in isolation, and without knowing what the other northern roads would do. Thus it is said that the practice of consultation through the rate conferences has a tendency to discourage rate reductions that might otherwise be made.

It is then further suggested that anything which discourages or impedes rate reductions from the South to the North (but apparently not from the North to the South) discriminates against the South. This suggestion is founded on the fact that admittedly certain rates between the South and the North, including the class rates and certain commodity rates, are or have been on a higher mile-for-mile level than rates in the North, although many other northbound interterritorial rates on important southern products are at or below the northern mileage level. It is suggested that while these higher southern rates are obviously not discriminatory in the sense prohibited by the Interstate Commerce Act, since in many cases they have actually been prescribed or approved by the Commission, nevertheless in some sense it is "discriminatory" against the South to follow any practice, such as the rate-conference procedure, which might possibly discourage, or interpose any obstacle to, their reduction.

This argument, which is conceived for the purpose of inspiring the South with opposition to the rate conferences, rests on a radical repudiation of the policy and philosophy of rate regulation embodied in the Interstate Commerce Act, and also upon what can only be described as a tragic failure to perceive and understand the true interests of the South.

The suggestion that it is somehow discriminatory to refuse to reduce rates which are higher, mile for mile, than rates on like articles between other points, even though the higher rates are not themselves discriminatory under the Act, involves a complete failure to understand the provisions of the Act with respect to discrimination. Under the Interstate Commerce Act, as at common law, rates are not discriminatory merely because they happen to be on a higher mileage level than rates on the same article between other points.[35] The Interstate Commerce Act creates no such arbitrary yardstick of discrimination, which, if adopted, would require that rates should be on the same mileage level between all points in the United States irrespective of traffic and transportation differences. Any such requirement would totally disrupt the commerce of the country. Under the Interstate Commerce Act departures from arithmetical rate equality are justified by what are known as differences in transportation conditions, including differences in the cost of transportation in the different rate territories due to building costs, operating costs, differences in traffic volume, and the like.[36] Whether such differences in transportation conditions actually exist as to justify arithmetical differences in rates is obviously not a matter which can be determined by the free operation of competition, but only by the judgment of some expert body. Accordingly, the Interstate Commerce Act confers on the Commission exclusive jurisdiction to determine what rates are discriminatory and what are not.[37] It would be completely disruptive of the unity and effectiveness of regulation under the Act if it were now held that there is some other kind of discrimination, different from that prohibited by the Act, which the railroads commit by charging rates on different mileage levels even where those rates have the sanction of Commission approval. This would, however, be the necessary consequence of holding that it is illegally discriminatory for the railroads to engage in rate con-

[35] In a long line of decisions, the courts have held that the provisions of sections 2 and 3 of the Interstate Commerce Act do not require a uniform level of rates and charges, and that the Act does not prohibit arithmetical differences in rates, nor all discriminations and preferences, but only those that are undue, unjust or unreasonable. Interstate Commerce Commission v. Baltimore & O. R. R., 145 U. S. 263, 276 (1892); Manufacturers Ry. v. United States, 246 U. S. 457, 481 (1918); Nashville Ry. v. Tennessee, 262 U. S. 318, 322 (1923); United States v. Illinois Central R. R., 263 U. S. 515, 521 (1924); Board of Trade v. United States, 314 U. S. 534, 546 (1942); Barringer & Co. v. United States, 319 U. S. 1, 6, 13 (1943).

[36] The courts have held that, in determining whether a particular arithmetical difference in rates constitutes an undue, unjust or unreasonable discrimination, the standard to be applied is a "transportation standard," that is to say, a standard derived from an examination of the conditions under which the transportation service is to be performed. This was stated by Mr. Justice Brandeis in the following language: "To bring a difference in rates within the prohibition of section 3, it must be shown that the discrimination practiced is unjust when measured by the transportaton standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions." United States v. Illinois Central R. R., 263 U. S. 515, 524 (1924). See also Texas & Pacific Ry. v. United States, 280 U. S. 627, 638 (1933). And see I. L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION III-B, 685-687 (1936).

[37] "It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination exsted." White, C. J., in United States v. Louisville & Nashville Ry., 235 U. S. 314, 320 (1914). See also Manufacturers Ry. v. United States, 246 U. S. 457 (1918).

ferences, because these might have the effect of interposing an obstacle to the reduction of a rate that is on a higher mileage level than some other rate.

Not only does the argument now under discussion ignore and repudiate the policy of the Interstate Commerce Act with respect to what constitutes discrimination, it also contravenes the policy of the Act with respect to rate reductions. That argument assumes that under the antitrust laws shippers are legally entitled to progressive reductions in railroad rates, below the reasonable maximum fixed by the Commission, to the lowest point to which such rates can be driven by the free and untrammeled operation of competition. This view in turn presupposes that Congress has adopted for railroad rates a policy, based on the postulate of free competition, that, even though prices at times sink to levels so low as not to be remunerative, this condition promotes the public interest and should accordingly be enforced by law. Of course, Congress has not done this; the Interstate Commerce Act embodies the opposite philosophy. As has been pointed out above, the Act prescribes as one of the standards of rate reasonableness that rates must be adequate to yield revenues sufficient to enable the carriers, under honest, economical and efficient management, to provide an adequate national transportation service.[38] In other words, the rates to be reasonable must be remunerative.

Accordingly, it is simply not true that shippers are entitled by law to competitive rate reductions below the reasonable maximum rates established by the Commission. They are only entitled to rates which are reasonable under the standards prescribed by the Act, and not to any other kind of "reasonable" rates. There cannot be two legal standards governing the reasonableness of rates any more than there can be two legal standards for the determination of what constitutes discrimination. In both instances, the only legal standard possible is that which is prescribed by the Act, and the Act does not permit competitive rate reductions below the level of reasonably remunerative rates.

While the Interstate Commerce Commission since 1920 has been in a position to prevent the reduction of rates to unreasonably low levels by exercising its power to issue so-called "minimum-rate orders,"[39] it is not true that, in the absence of such an order by the Commission, shippers are entitled to any reduction, however great, that free competition would bring about. The question of whether a proposed rate reduction would make the resulting rate unduly low is one which, under the Act, goes not merely to the exercise of the Commission's minimum-rate power, but is also an element in the statutory standard determining the reasonableness of the rate. If the effect of the reduction would be to make the resulting rate unduly low, then that rate, irrespective of any minimum-rate order issued by the Commission, would be unlawful under the Act as not conforming to the prescribed standard of reasonableness, and the Commission has frequently so held. In passing upon the

[38] Interstate Commerce Act, section 15a(2). 41 STAT. 488 (1920), as amended, 49 U. S. C. §15a(2) (1940).

[39] Interstate Commerce Act, section 15(1). 41 STAT. 484-488 (1920), as amended, 49 U. S. C. §15(1) (1940).

power of the railroads to reduce their rates to meet competition the Commission has repeatedly said that such reductions, to be lawful, must not make the resulting rates unreasonably low.[40]

It is, therefore, obvious that even if the rate conferences should have the effect of discouraging rate reductions in certain instances, they would not thereby necessarily deprive shippers of any rates to which the latter are lawfully entitled, nor would they necessarily contravene the policy of the Interstate Commerce Act. On the contrary, in so far as the conferences serve, by informing the judgment of the carriers, to aid them in avoiding those competitive reductions which are unreasonable and, therefore, unlawful under the Act, they affirmatively promote the policy of the Act and assist the railroads in conforming to its prohibition against unreasonably low competitive rates. For the latter purpose, consultation and conference are indeed indispensable, since, in order to determine whether a rate is unreasonably low by the standards of the Act, it is not sufficient merely to determine whether the rate is compensatory for the particular railroad which proposes to put it into effect; it must also be tested by comparison with related rates that are applicable over other railroads and competing routes to determine what effect the proposed reduction would have upon the earnings of all the carriers interested in the particular rate adjustment.[41] That the Act so requires has been repeatedly held by the Commission with the approval of the courts.

Thus, in *Ex-Lake Iron Ore from Chicago to Granite City,* the Commission said:

> Plainly we are justified in condemning a rate on the ground that it is unreasonably low, where it is shown that it will cause loss rather than gain to the publishing road or roads and will thus impose a burden upon other traffic. In suspension proceedings, in view of the burden of proof, we are justified in condemning a proposed rate, protested as too low, if the carriers which sponsor it do not sufficiently show that it will cause gain rather than loss. But our authority, in our opinion, goes further. We are justified in condemning a proposed rate as too low if the evidence warrants the conclusion that it will, because of its lowness, tend to precipitate changes in rate structure or in traffic which will be harmful to the public interest, having in mind our responsibility for railroad earnings in general under section 15a.[42]

Again, in *Gasoline from San Francisco Bay Points to Ogden, Utah,* the Commission said with reference to two decisions of the Federal courts:

> The broad purpose of and the ultimate responsibilities imposed upon us by both the old and the new section 15a(2) are the same, namely, in prescribing rates to give "due consideration . . . to the need of revenues sufficient to enable the carriers, under honest,

[40] East St. Louis Cotton Oil Co. v. Baltimore & O. R. R., 243 I.C.C. 43, 46 (1940); Petroleum from South Atlantic Ports to Southeast, 244 I.C.C. 23, 29 (1941); Macaroni between Western Trunk-Line and Southwestern Territories, 238 I.C.C. 121, 124 (1940); Express Merchandise from Cincinnati to South, 210 I.C.C. 89, 93 (1935); Lake and Rail Class and Commodity Rates, 214 I.C.C. 93, 118 (1936); Atlantic City Coal Dealers Credit Bureau v. Atlantic City R. R., 209 I.C.C. 737, 741 (1935).

[41] Ex-Lake Iron Ore from Chicago to Granite City, 123 I.C.C. 503, 504 (1927); Salt Cases of 1923, 92 I.C.C. 388, 410 (1924); Coal from Indiana to Illinois, 197 I.C.C. 245 (1933); 200 I.C.C. 609, 621 (1934); Sugar from New Orleans to Arkansas, 243 I.C.C. 703, 708 (1941).

[42] 123 I.C.C. 503, 504 (1927).

economical, and efficient management, to provide . . . adequate and efficient railway transportation service." See *United States v. Louisiana,* 290 U. S. 70.

In *Jefferson Island Salt Mining Company v. United States,* 6 Fed. (2d) 315, referring to the enlarged powers conferred upon us by amended sections 13, 15 and 15a, the Court said:

"By these sections the Commission is now empowered to raise the rates, not merely because noncompensatory to the carrier receiving them, but because they are unjust or unreasonable from the point of view of other carriers and localities."

In *Anchor Coal Company v. United States,* 25 Fed. (2d) 462, 471, the following appears:

"Of course, since the passage of the Transportation Act of 1920 the Commission has the right to prescribe minimum rates, and we agree with the Commission that a construction of the law is too narrow which limits its right to prescribe such rates to cases where the rates proposed are unreasonable *per se,* or are so low as to cast a burden on other traffic. It has the right to prescribe minimum rates also to prevent ruinous rate wars and to guarantee reasonable earnings, not only to the carrier affected but also to competing carriers, who may labor under a higher cost of doing business."[43]

The Commission further expounded the law on this subject in its report in *Coke from Southern Points to Southern Ports,* in the following language:

It is obviously our duty to prevent rate wars between competing carriers, under which they reduce rates below a reasonable basis in an effort to capture traffic handled by their competitors and are met by corresponding reductions calculated to hold the traffic to the lines of the carriers already handling it. Eventually we could end such a rate war under Section 1 of the Act by permitting retaliatory reductions until one or the other rate became *per se* unreasonably low. If this course were followed, certain shippers temporarily would obtain the advantage of rates below a reasonable basis, but the shipping public would eventually foot the bill, either through increased rates on other traffic or deterioration of service. . . .[44]

From the foregoing unanimous course of authority, as well as the plain and obvious policy embodied in the Interstate Commerce Act, it is clear that no shipper, state, or section is unlawfully discriminated against, or in any other way deprived of any legal right, by the fact that the rate conferences may in certain instances have a tendency to discourage rate reductions which the forces of competition might otherwise bring about, but which would have a destructive effect on the revenues of the railroads.

The interest of the South in the destruction of the rate conferences is being enlisted on the representation that if in some way the restrictions of the Interstate Commerce Act could be nullified, and railroad rates thrown open to the free play of competition, reductions would result in those higher northbound interterritorial rates of which the South complains, and southern shippers would thereby be advantaged. The argument rests upon the contention that it would be to the interest of the South if the rate structure of the country were more flexible and fluid, and more responsive than it is, under regulation, to the sudden and multiple changes that

[43] 198 I.C.C. 683, 697 (1934).
[44] 204 I.C.C. 767, 773 (1934).

would result if the railroads constantly lowered their rates to take business away from one another. I venture to suggest that nothing would be more disadvantageous than this to the South, or more effective in defeating its attainment of the advantageous rate relationships which it desires with other sections of the country. Presumably and purportedly, what the South desires is a stable rate relationship of equality with the North. Such a desire cannot be gratified without reasonable stability in the rate structure, since what the South seeks is assurance that the desired rate relationship will be maintained with some degree of permanence.

Nothing could more effectively frustrate the demands of the South in this respect than for the philosophy of a fluid rate structure to triumph over the philosophy of regulation embodied in the Interstate Commerce Act. If the former philosophy should supersede the latter as the basis of our transportation law, the hope of any stable relationship between southern and northern rates would become an empty dream. If rate relationships were to be made a plaything of the unrestricted forces of competition, and were cut loose from the regulatory restrictions and voluntary procedures which give to them the degree of stability that they now have, there would be no way whatever by which the South could be assured that her rates would bear the relationship that she desires to the northern rate level, or any certain relationship whatever. On the contrary, the forces of unrestricted competition not only might, but almost certainly would, drive down rates in the North to levels below those which the same forces would produce in the South. If this were so, the South would no longer have any recourse in effective regulation by which to redress the balance. The South should, therefore, realize that its hope of obtaining the level of rates which it professes to desire lies in the continuance of the effective restraints on competitive rate making which are embodied in the Interstate Commerce Act. It has been my purpose in this paper to show that the existence and operation of the rate conferences are not only in exact accord with the policy of those regulatory restraints, but are essential to make them effective.

CAN EXISTING REGIONAL DIFFERENCES IN CLASS-RATE LEVELS BE JUSTIFIED?*

D. PHILIP LOCKLIN†

It is the purpose of this paper to examine the arguments used in defense of the present regional differences in the levels of class rates. The discussion may well begin with a summary of certain facts regarding the differences in rate levels, although these facts are by this time well known to those who have been concerned with the problem:

1. The scales of first-class rates applicable in the five rate territories vary considerably in their levels. The levels are substantially higher in southern, western trunk-line, southwestern, and mountain-Pacific territories than in eastern, or official, territory.

2. Although precise comparison of the levels of first-class rates is difficult, partly because the relation between the rates varies at different points in the distance scales, and partly because actual rates are not always made strictly on the scales, a general statement regarding the relationships of the scales may be made. The study made by the Board of Investigation and Research gave the following relationships, taking the official-territory scale as 100:[1]

Official	100
Southern	139
Western trunk-line	
Zone I	128
Zone II	146
Zone III	161
Zone IV	184
Southwestern	161
Mountain-Pacific	166

3. The relatives shown above also express the approximate relationships of rates on individual commodities moving on class rates when the ratings on such commodities are the same, in percentage of first-class rates, in the various terri-

* This paper was prepared before the announcement of the Supreme Court's decision upholding the order of the Interstate Commerce Commission in the *Class Rate* case. See the FOREWORD to this symposium. The rate levels discussed here are those which were in effect at the time of the Commission's investigation, and which remained in effect until the litigation over the Commission's order was terminated by the recent decision of the Supreme Court. [Ed.]

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[1] BOARD OF INVESTIGATION AND RESEARCH, REPORT ON INTERTERRITORIAL FREIGHT RATES, H. R. Doc. No. 303, 78th Cong., 1st Sess. 20 (1943). These relationships have been changed somewhat by reason of the larger increases in rates in eastern territory than in the other territories authorized in *Ex parte* No. 148, 264 I.C.C. 695 (1946), and *Ex parte* No. 162, 266 I.C.C. 537 (1946).

tories. Thus, if an article is rated 50 per cent of first class in any two territories, the relationships of the rates in the two territories are approximated by the relatives shown above. Differences in classification ratings in the different territories, however, make the differences in the rate levels on some commodities greater, and on others less, than the differences in the levels of the class-rate scales.

4. On many articles lower ratings have been given in the South or West, often by means of classification exceptions, in order to bring the rate level on the commodity in question to the level prevailing in official territory, or nearer to that level. The same result is accomplished in other instances by providing commodity rates in the South or West on certain articles which move on class rates in official territory.

5. On many commodities which practically always move on commodity rates in all territories the rate levels also differ considerably in the various territories. Regional variations in the rate levels on such commodities are usually less than are found in the levels of class rates. There are some commodities generally moving on commodity rates on which the rates are as low in the South as in eastern territory, and some on which the southern rate level is lower. In the *Class Rate Investigation* the Interstate Commerce Commission mentioned the following commodities as among those which take lower rates in the South than in official territory: brick; fertilizer and fertilizer materials; coke; lime; logs; pig iron; lumber; pulpwood; sand, gravel, crushed stone, and slag; iron and steel scrap; sulphuric acid; and iron ore.[2] The common belief, however, that commodity rates in the South are always, or nearly always, lower than in official territory is not warranted.

6. Articles on which lower rates have been voluntarily provided in the South and West, or interterritorially from the South and West, either by means of classification exceptions or by commodity rates, tend to be commodities which have come to have considerable traffic importance; that is, they are products of industries which have become important in the economy of the areas concerned and which furnish important amounts of traffic to the railroads.

7. Over a period of years the Interstate Commerce Commission, in numerous cases which have come before it, has required or approved reductions in rates from the South to the North on particular commodities, sometimes reducing them to approximately the northern level,[3] at other times reducing them so that they exceeded the northern level by only 10 per cent or less.[4]

[2] 262 I.C.C. 447, 593-600 (1945).

[3] In the *Class Rate Investigation, id.* at 603, the Commission listed the following instances of such action: Brick and Clay Products in the South, 88 I.C.C. 543 (1924); American Distilling Co. v. Akron, C. & Y. Ry., 140 I.C.C. 633 (1928); Krupp Foundry Co. v. Southern Ry., 148 I.C.C. 743 (1928), 156 I.C.C. 415 (1929); Hosiery from Southern Points, 156 I.C.C. 117 (1929); Cullet in Southern Territory, 169 I.C.C. 153 (1930); Eastern Tanners Glue Co. v. Southern Ry., 171 I.C.C. 213 (1930); Stone, Marble and Slate from or to Southern Points, 183 I.C.C. 611 (1932); Muscle Shoals White Lime Co. v. Akron & B. R.R., 205 I.C.C. 273 (1934); Coke from Alabama and Tennessee to Central Territory, 208 I.C.C. 281 (1935), 215 I.C.C. 384 (1936); Sugar from Gulf Port Groups to Northern Points, 234 I.C.C. 247 (1939); State of Alabama v. New York Central R.R., 235 I.C.C. 255 (1939), 237 I.C.C. 515 (1940); Alabama By-Products Corp. v. Ahnapee & Western Ry., 256 I.C.C. 649 (1943).

[4] For example, Paper, Official-Illinois Territories to South, 234 I.C.C. 81 (1939), 238 I.C.C. 104

8. Notwithstanding the many articles on which the southern and western rate levels, or interterritorial rates from the South or West, have been reduced to the official territory level, or nearly thereto, it remains true that on a great many commodities higher rates prevail in the South and West, and interterritorially, than apply for equal distances in official territory. The interterritorial rates on such articles frequently represent a blend of the rate levels in the origin and destination territories, and are therefore higher than the level applying within official territory.

9. It is obvious that these differences in rate levels may often impose a handicap on producers in southern and western territories in attempting to sell goods in official territory in competition with producers located in official territory.

ATTEMPTED JUSTIFICATION OF REGIONAL DIFFERENCES IN RATE LEVELS

Three main arguments have been advanced in an effort to justify existing differences in class-rate levels. The first is that there are substantial differences in transportation costs in the different rate territories. The second is that there are differences in the "distribution of the transportation burden" in the different territories that arise from differences in the composition or "consist" of the traffic. The third is that the existing rate structures in the South and West are advantageous to those areas, and that equalization of the levels would adversely affect the South and West. Each of the three arguments stated will be examined in turn.

Regional Differences in Transportation Costs

There are many cases in which the Commission has, in the past, referred to less favorable transportation conditions in the South and West as a justification of higher levels of rates in those areas. That transportation conditions were less favorable in the South than in eastern territory came to be considered almost axiomatic.[5] In 1935, however, in *Cotton, Woolen, and Knitting Factory Products,*[6] southern shippers contended that transportation costs were lower in the South than in the North. The Commission was not convinced that such was the case, and said: "If necessary corrections of inequalities, especially as to length of haul, were made, and the comparisons were made of properly comparable figures and periods of time, this record would show affirmatively that southern territory should continue to be considered higher rated territory than official territory."[7] As late as 1939 the Commission, in *Divisions of Rates, Official and Southern Territories,*[8] made a specific finding that transportation costs were higher in the South than in the North, although the northern

(1940); Livestock to and from the South, 253 I.C.C. 241 (1942); Schoen Bros., Inc. v. Erie R.R., 258 I.C.C. 471 (1944); Cotton, Woolen, and Knitting Factory Products, 258 I.C.C. 471 (1944); Florida Railroad Comm'n v. Atlantic Coast Line R.R., 264 I.C.C. 365 (1946).

[5] For illustrative cases in which less favorable conditions in the South have been mentioned, see Class and Commodity Rates, 38 I.C.C. 411, 430 (1916); Commercial Club of Carrollton v. Director General, 55 I.C.C. 697, 700 (1919); Barytes from Tennessee, 43 I.C.C. 334, 337 (1917); Cincinnati Ass'n of Purchasing Agents v. Louisville & N. R.R., 89 I.C.C. 285, 294 (1924); Eastern Livestock Cases of 1926, 144 I.C.C. 731, 766 (1928); Blue Ridge Glass Corp. v. Akron & Barberton Belt R.R., 182 I.C.C. 493, 495 (1932).

[6] 211 I.C.C. 692 (1935). [7] *Id.* at 723. [8] 234 I.C.C. 175 (1939).

carriers contended that costs in the two territories were substantially equal.[9] Later in the same year, however, doubts about the truth of the contention that transportation costs were higher in the South than in the North were expressed in the so-called *Southern Governors' Case*.[10] The Commission said: "The freight traffic density in the southern region is considerably lower than that in the eastern district. This, taken by itself, would suggest higher costs therein. But other factors, such as lower investment, lower terminal cost, etc., appear largely to offset the lower density."[11] The Commission concluded that "the cost of transporting the articles named in the complaint from producing points in the South into the North, compared with that of transporting like articles within the North, does not justify the maintenance thereon of higher levels of rates than are applicable on like articles within the North."[12] Commissioner Eastman, however, was not convinced that transportation costs were as low in the South as in official territory, and expressed the opinion that they were actually higher.[13] Commissioner Miller also felt that the cost studies relied upon were inconclusive.[14]

Although it was not until 1939 that the Commission showed signs of questioning the belief that transportation costs were substantially higher in the South than in eastern territory, two cost studies made somewhat earlier by the Bureau of Statistics of the Commission, one published in 1930[15] and the other in 1938,[16] indicated that transportation costs in the South compared very favorably with those in the East.[17] Notwithstanding the limitations of these cost analyses, they served to bring out the fact that regional differences in transportation costs were not great, and that the costs in the South were as low as those in official territory, or slightly lower.

A more elaborate analysis of regional differences in railroad transportation costs was made by Dr. Ford K. Edwards, of the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission, in connection with the *Class Rate Investigation* of 1939, and this study was embodied in various exhibits introduced in that proceeding. One feature of the Edwards study that distinguished it from earlier studies of the Bureau of Statistics was that it determined costs separately for traffic handled in the different classes of equipment—tank cars, box cars, gondola and hopper cars, and others. This procedure remedied in part the weakness inherent in the use of average costs, which do not take into consideration differences in the nature or composition of the traffic, since it recognized such differences to the extent that they resulted in the use of different types of equipment. The results of the

[9] *Id.* at 189.
[10] State of Alabama v. New York Central R.R., 235 I.C.C. 255 (1939).
[11] *Id.* at 307. [12] *Id.* at 326. [13] *Id.* at 343-345.
[14] *Id.* at 348.
[15] STATEMENT NO. 3018, TERRITORIAL VARIATION IN THE COST OF CARLOAD FREIGHT SERVICE ON STEAM RAILWAYS IN THE UNITED STATES FOR THE YEAR 1928.
[16] STATEMENT NO. 3812, TERRITORIAL VARIATION IN THE COST OF CARLOAD FREIGHT SERVICE ON CLASS-I STEAM RAILWAYS IN THE UNITED STATES FOR THE CALENDAR YEAR 1936.
[17] The results of these studies are summarized in BOARD OF INVESTIGATION AND RESEARCH, REPORT ON INTERTERRITORIAL FREIGHT RATES, H. R. DOC. NO. 303, 78th Cong., 1st Sess. 252-255 (1943).

Edwards cost study and of other cost studies introduced in the *Class Rate Investigation* were summarized by the Commission in its report in the investigation. The Commission stated its final conclusions on this question as follows: "The various comparisons of territorial costs reviewed hereinabove show that there is little significant difference in the cost of furnishing transportation in the South as compared to the East, excluding the Pocahontas territory. The figures both for the year 1939 and the period 1930-39 indicate that, taken as a whole, the costs in the South are equal to or a little lower than those in the East. If the period 1937-41 is used, the costs in the South are substantially lower than those in the East."[18]

So far as costs in the West were concerned, the Commission's conclusions were expressed in the following language: "Comparisons based on the year 1939 and the period 1930-1939 show the over-all cost of rendering transportation service in the western territory to be between 5 and 10 per cent higher than in the East, excluding the Pocahontas territory. If the year 1941 were used, this difference would be reduced to 5 per cent or less."[19]

Two commissioners—Porter and Barnard—found the Edwards cost study unconvincing. Both criticized the study on the ground that it did not take into consideration differences in the "consist" of traffic.[20] As previously pointed out, however, the Edwards study did recognize differences in the composition of traffic to some extent in that separate calculations were made of the cost of handling traffic in the various types of equipment. This procedure recognized that the cost of transporting a commodity which moves in box cars may be quite different from the cost of transporting a commodity which moves in gondola cars, but that the cost of transporting one commodity in box cars will not differ very much from the cost of transporting another commodity in box cars except as average loading, loss and damage claims, and special service requirements may differ. In cost study the only differences in composition of traffic that are significant are differences that affect costs.

The other main criticism of the Edwards cost study made by Commissioners Porter and Barnard was that it did not purport to show differences in the costs of transporting *class* traffic in the different territories. If the Edwards cost study had attempted to compare the average cost of transporting class traffic in the East, whatever it might consist of, with the cost of transporting class traffic in the South, whatever *it* might consist of, the study would then really be open to the criticism that it was a comparison of unlike things, and did not recognize differences in the nature of the traffic. This is so for two reasons: first, because some things which move on class rates in one territory move on exception ratings, or on commodity rates, in another; and second, because even if the same articles moved on class rates in all territories, differences in the relative volume of different articles having different transportation costs might distort the figures.

[18] Class Rate Investigation, 1939, 262 I.C.C. 447, 591 (1945).
[19] *Ibid.*
[20] See dissenting opinion of Commissioner Porter, 262 I.C.C. 447, 716-719; and of Commissioner Barnard, *id.* at 728-729.

In the preceding paragraphs it has been assumed that differences in the levels of class rates in the various rate territories would be justified if there were substantial differences in transportation costs. This is a reasonable assumption. It may be noted in passing, however, that differences in the average transportation costs among the different rate territories are less than the cost differences that exist *within* the various rate territories. As a practical matter it has been found expedient to ignore many of these differences in cost in different portions of a rate territory, or on different railroads serving the same territory, and to have a single level of class rates over wide areas. Of course there are numerous exceptions to this policy, as is evidenced by the special treatment afforded New England, and part of Michigan, in eastern territory, and of Florida in southern territory, and the special treatment afforded short and weak railroads generally. Notwithstanding these exceptions, substantial differences in transportation costs have for practical reasons been ignored in setting up intraterritorial class-rate structures. This fact is pointed out to draw attention to the fact that a uniform level of class rates throughout the United States would not be such a radical step as it is sometimes portrayed as being.

Argument over the extent to which regional differences in transportation costs should be reflected in differences in class-rate levels is purely academic if there are no substantial differences in cost. The Edwards cost study, along with the earlier examinations of the question, bears out the contention that the differences in cost are slight.

It may be worth while to discuss one of the reasons why the findings of the Edwards study that transportation costs were as low in the South as in the North were difficult to accept at first, and were received with some skepticism. The findings did not seem to square with the financial results of railway operations as expressed by the relation of net railway operating income to investment in property, or to property valuations, since for many years the southern railroads had made a poorer showing than the eastern railroads. It was this situation which caused Commissioner Eastman to question the Commission's conclusion in the *Southern Governors' Case* that transportation costs were not greater in the South than in the North.[21] The same point was raised in the *Class Rate Investigation*. The southern carriers argued that if the costs were less in the South than in the East, as the Edwards cost study seemed to indicate, and if the rate level in the South was higher, as was conceded, then the southern railroads should have earned a larger rate of return on their investment than the northern railroads, whereas the reverse was the case. It is true that in the years 1930 to 1936, inclusive, the railroads in the southern region did earn a lower rate of return on their investment than did the railroads in the eastern district.[22] This might be attributed, in part, however, to the lower passenger fares in the South, and to the low revenues from this source. Average freight revenues per ton-mile in the South were from 3 to 5 per cent higher than

[21] State of Alabama v. New York Central R.R., 235 I.C.C. 255, 343-345 (1939).
[22] See BOARD OF INVESTIGATION AND RESEARCH, *op. cit. supra*, note 17, at 265.

in the East, but the revenues per passenger-mile in the South were lower than in the East. Although the earnings of the southern railroads were less favorable than those of the eastern railroads in the period 1930 to 1936, later years have shown the southern railroads to be earning more generous rates of return than the roads in the eastern district.[23] This fact was noted by the Interstate Commerce Commission in the *Class Rate Investigation*. The Commission showed that the rates of return earned in recent years by the southern and the eastern railroads on their reported investment in railway property, plus cash, materials, and supplies, had been as follows:[24]

	Southern Region	Eastern District
1936	2.52 per cent	2.67 per cent
1937	2.35 per cent	2.27 per cent
1938	1.90 per cent	1.26 per cent
1939	2.50 per cent	2.34 per cent
1940	2.57 per cent	2.66 per cent
1941	4.24 per cent	3.62 per cent
1942	6.51 per cent	4.90 per cent
1943	5.73 per cent	4.32 per cent

The table shows that only in 1936 and in 1940 did the southern railroads fail to show better earnings than those in the eastern district. It is significant that subsequent developments have also shown the southern roads to be better earners than the eastern roads. In June, 1946, when the Interstate Commerce Commission permitted the railroads to restore temporarily the war-time increases in rates[25] which had originally been authorized in 1942[26] but which had been subsequently suspended, it permitted an additional increase of 5 per cent in official territory because of the low earnings of the railroads in the eastern district. The Commission noted that in 1945 the railroads in the eastern district earned 4.30 per cent on their estimated value for rate-making purposes, while those in the southern region earned 5.38 per cent, and those in the western district earned 5.71 per cent.[27] We must conclude that the financial results of railway operation in recent years do not disprove the conclusions of the Edwards cost study that transportation costs are no higher in the South than in the East.

The conclusion seems amply warranted that differences in transportation costs do not require the existing differences in the levels of class rates in the different rate territories. The Commission, in the *Class Rate Investigation,* was very positive in its findings on this matter. After pointing out that it had long been considered impractical and unwise to attempt to reflect all differences in cost in the rate structure, the Commission said: ". . . there is no doubt that, based on cost of service considerations,

[23] *Ibid.*
[24] 262 I.C.C. 447, 613 (1945).
[25] *Ex parte* No. 162, Increased Railway Rates, Fares, and Charges, 1946, 264 I.C.C. 695 (1946).
[26] *Ex parte* No. 148, Increased Railway Rates, Fares, and Charges, 1942, 248 I.C.C. 545 (1942).
[27] *Ex parte* No. 162, 264 I.C.C. 695, 728 (1946).

the differences in levels, schemes, and progressions of scales that at present occur in the several territorial class-rate structures here under review are not justified."[28]

Differences in the Distribution of the Transportation Burden

Justification of differences in the levels of intraterritorial class rates has been sought not only in alleged differences in transportation costs, but in differences in "the distribution of the transportation burden" in the different rate territories. It is argued that it has been the policy of the carriers in the South and West to maintain relatively high rates on manufactured articles and low rates on raw materials and certain other products of those areas, while the policy of the carriers in eastern territory has been to accord manufactured articles somewhat more favorable rates than apply in the South and West. To some extent this argument seems to be an attempt to justify a discrimination by itself. When differences in class rates are challenged, it is a weak reply to argue that they are justified because they have long been that way. The real question is whether the differences in rate policy followed in the different territories are justified. The defenders of the present class-rate differences recognize this when they go on to say that the differences in the "distribution of the transportation burden" in the different rate territories are required by differences in the composition or "consist" of the traffic. It is contended that the smaller volume of high-grade manufactured articles in the traffic of the South and West requires higher rates on these articles than are provided in official territory if the railroads are to obtain adequate revenues.

If substantial differences in class rates are not to be justified by differences in transportation costs, but by differences in rate policy, or in the "distribution of the transportation burden," the real issue is the scope to be allowed to value-of-service or what-the-traffic-will-bear factors in rate making. Most economists believe that because of the substantial volume of fixed or constant expenses in the railroad industry it is sound policy to adjust rates with some consideration to the conditions of demand, or, in railroad parlance, to give some attention to the value of the service or what the traffic will bear. By this process full utilization of plant is facilitated, and unit costs are made lower than under any other policy of pricing. Certain limitations on this policy are recognized, however. Rates less than fully allocated cost are justified only if they do not fall below variable or out-of-pocket costs, and if the traffic will not stand normal rates. There must also be a check on the practice of charging what the traffic will bear in order to prevent monopoly profits arising from carrier exploitation of the fact that some traffic can stand rates greatly in excess of transportation costs. Furthermore, differences in rates based on real or assumed differences in what the traffic will bear should not be permitted when they create unjust discrimination, or undue preference and prejudice.

We may return now to an examination of the class-rate structure to determine the extent to which a difference in the distribution of the transportation burden in the different territories has been recognized, and how it is to be explained.

[28] 262 I.C.C. 447, 694 (1945).

In a great many cases the Commission has recognized the fact that there were differences in the distribution of the transportation burden in the different rate territories.[29] The difference, so far as the North and South are concerned, has been the maintenance of relatively higher class rates in the South; and on some commodities, relatively low commodity rates. In *Rates on Bristol & Norton Lines of Norfolk & Western Railway,* the Commission pointed out that "commodity rates in the South are often on a relatively lower level in comparison with class rates, and sometimes on an absolutely lower level than they are in the North."[30] In *Knoxville Freight Bureau v. Southern Railway,* the Commission also observed that "class rates are relatively low and commodity rates generally are relatively high in official territory as compared with those in the South."[31] The reason for this difference in the distribution of the transportation burden is suggested in *Eastern Bituminous Coal Investigation,* where the Commission said: "Official territory is so predominantly concerned in manufacturing that a rate structure has developed there which appears on the whole to be more favorable to high-grade manufactured products and less favorable to low-grade basic commodities, relatively, than the rate structures of certain other territories."[32]

To point out that differences in the distribution of the transportation burden have existed in the past in the various rate territories, and that a historical explanation of the differences is to be found in differences in the dominant economic interests of the several regions, is not to justify the differences in rates. The question remains whether such differences in the distribution of the transportation burden are necessary or proper.

One matter that needs to be made clear at this point is that it is difficult to justify higher class rates as a whole in one territory than in another on the basis of differences in the ability of traffic to stand high rates. Class traffic is not a homogeneous thing. It is made up of thousands of articles of varying abilities to pay transportation charges. With respect to some of these articles there might be regional differences in what the traffic would bear. For other commodities there are probably no such differences. This situation is amply demonstrated by the many articles which have been given lower ratings in the southern classification, or in exceptions thereto, in order to offset in whole or in part the higher class rates in the South, and thus to make the rates on these articles equal to, or more nearly equal to, the rates in official territory. The same result is attained on other commodities by the use of commodity rates. These examples indicate that the maintenance of a different "distribution of the transportation burden" on these particular articles in the South and in official

[29] See Coke from Alabama & Tennessee to Central Territory, 208 I.C.C. 281, 289 (1935); Cushwa & Sons v. Arcade & Attica R.R., 185 I.C.C. 280, 288 (1932); Brick & Clay Products in the South, 155 I.C.C. 730, 736 (1929).

[30] 192 I.C.C. 315, 324 (1933).

[31] 156 I.C.C. 315, 318 (1929). See also Stoves, Ranges, Boilers & House-Heating Furnaces, 169 I.C.C. 169, 179 (1930); Central Leather Co. v. Akron, C. & Y. Ry., 159 I.C.C. 56, 61 (1929); and Southeastern Sugar Investigation, 132 I.C.C. 477, 499 (1927).

[32] 140 I.C.C. 3, 16 (1928).

territory was either impossible or inexpedient because of the competitive disadvantages created thereby.

In the *Class Rate Investigation* differences in the distribution of the transportation burden, resting upon differences in the nature and composition of the traffic, were urged both as justifying a higher level of class rates as a whole in the South and West and also as justifying a lack of uniformity in freight classification. In considering the argument as a justification of higher levels of class rates in the South and West than in official territory the Commission pointed out that these higher rates, together with the interterritorial rates which reflect these levels, operated to the disadvantage of producers in the higher rated territories. The Commission pointed out that official territory is the greatest consuming territory in the country, and is the market which all manufacturers desire to reach if possible. "In shipping to official territory, manufacturers in the other territories not only have the disadvantage of location, but are subjected to an additional burden in those instances where they must pay class rates on a much higher level than their competitors in official territory."[33] The Commission said that this situation "reacts to the disadvantage of manufacturers in the other territories, and to the advantage of those in official territory, tends to restrict the growth and expansion of the manufacturers in the other territories, and, to some extent, to prevent the establishment of new manufacturing plants in those territories."[34] That such would naturally tend to be the result of substantial differences in class-rate levels in the different territories seems obvious. The Commission went on to point out that the method of distributing the transportation burden in the South and West, by imposing higher rates on class traffic, had been largely unsuccessful. "It is clear that the method of distribution of the rate burden between types of traffic now observed in southern, southwestern, and western trunk-line territories has resulted in rates so high that they have prevented the free movement of traffic at the rates in issue. This result is fully proved by the fact that numerous lower exception and commodity rates which move the great preponderance of the traffic and produce the great preponderance of the revenues in those territories, have been established."[35] The conclusion seems warranted that the attempt to maintain a different distribution of the transportation burden on some commodities in the South and West than in official territory has been unsuccessful, and that in other instances it has created undue preference and prejudice.

Differences in the composition of the traffic were also urged in the *Class Rate Investigation* as justifying or requiring differences in classification ratings in the different territories. The Commission's statement of this argument, and its reply thereto, deserve quotation:

> Differences in classification ratings are defended upon the ground that they are justified by differences in the composition of traffic in the several territories. Thus in one territory,

[33] 262 I.C.C. 447, 696 (1945).
[34] *Ibid.*
[35] *Ibid.*

there may be a large movement of low-grade commodities on which the ratings are relatively low and a small movement of manufactured articles on which the ratings are relatively high, and in another territory the reverse may be true. The contention is that in order to obtain the necessary revenue, it is proper to make the ratings higher in one territory than in another. This presupposes that in the determination of a reasonable rating consideration and weight must be given to the volume of the traffic in the respective territories.

We believe that the assignment to the same article of commerce of a rating which is different (in terms of percentage relation between class rates governed thereby) throughout one territory from the rating in another, because the article moves in large volume in the one as a whole and in small volume in the other, causes undue preference and prejudice between the shippers in the two territories, as well as between the traffic and between the territories.[36]

The Commission has thus recognized that differences in rate levels on particular commodities which result from differences in classification ratings in different territories tend to create undue preference and prejudice. The Commission allowed ample leeway for local differences in classification ratings on particular articles when justified, since it held that local exceptions to the classification or commodity rates might be published where circumstances warranted such action. "Where adequate justification exists for lower charges in a portion of a territory, or from and to particular points, the proper remedy is the establishment of lawful exceptions to the classification, or commodity rates."[37] The Commission, however, in order to prevent the use of classification exceptions to break down the substantial uniformity considered essential, indicated that exception ratings should be confined to such situations as could be justified individually upon their own merits.[38]

Freight Rates and Regional Protectionism

A few spokesmen for the South and West defend the present rate structures on the ground that they are best adapted to the economy of those areas. Equalization of rate levels, these spokesmen contend, would work to the disadvantage of the South and West by depriving them of the present advantages in rates which they enjoy.

It is beyond the scope of this paper to engage in a debate over the kind of rate structure that would be most advantageous to the South, or to the West, or to any particular section of the country. The contention of the southern group which defends the present rate structure as in the best interest of the South is based on the fact that the southern rate structure, both intraterritorially and interterritorially, has certain protectionist features.

These protectionist features include (1) high interterritorial rates on manufactured products which to some extent protect southern manufacturers from northern competition in southern markets; (2) low rates within the South on some raw materials used in southern industries; and (3) relatively low interterritorial rates on certain important manufactured and other products of the South for which a

[36] *Id.* at 505. [37] *Ibid.* [38] *Id.* at 511.

market is sought in the North.[39] The relatively high interterritorial class rates which protect some southern manufacturers from northern competition also restrict the ability of certain other southern manufacturers, actual or potential, to sell in northern markets. It is the conflict between these two effects of high interterritorial class rates that has divided the South on the freight-rate question.

One of the most outspoken advocates of a distinctly protectionist and mercantilist rate policy is Mr. C. E. Widell, associated with the Tennessee Manufacturers' Association. Mr. Widell says:

> Obviously, the ideal rate structure for any manufacturing region like the South should consist of (1) low rates within the South on in-bound raw materials—that is within the region—(2) rates on manufactured goods within the South that will protect the South's industrial economy; (3) a rate scale so graded as to give the manufacturer in the South the greatest possible advantage of large differences in rates against competitors in southern markets; and (4) out-bound rates on manufactured goods to outside markets on rate scales with the smallest differences against the southern manufacturer.[40]

Similar views have been expressed by other traffic men representing industries or groups of industries in the South which fear a possible disturbance of rate adjustments which are apparently favorable to them.[41]

The argument that the present rate structure in the South is best for the South, like all protectionist arguments, identifies the interest of the South with the interest of certain special groups. Assuming, for the sake of the argument, that the real interest of the South is identical with the interest of certain important producing groups in the South, it may be said that a rate structure which favors certain important southern products exported to official territory, and which protects southern manufacturers and producers in local markets from the competition of northern and western producers, is as much to be condemned from a national standpoint as one which discriminates against other products of the South, actual or potential, in northern markets. It is just as objectionable to have a rate structure which keeps northern goods out of the South as one which keeps southern goods out of the North. Rates which are discriminatory against the South cannot be defended by pointing to other rates that are not discriminatory, or that may even be preferential of the South, and to others that discriminate against northern products in the South. The ideal rate structure is one which enables each section of the country to develop according to its natural advantages without artificial rate handicaps or preferences.

[39] For a more detailed listing of protectionist features of the southern rate structure, see Heath, *The Uniform Class Rate Decision and Its Implications for Southern Economic Development*, 12 SOU. ECON. J. 213, 233 (1946).

[40] See *Hearings before Committee on Interstate Commerce on S. 942*, 78th Cong., 1st Sess. 929 (1943).

[41] Particularly Mr. A. W. Vogtle and Mr. A. J. Ribe, both of Birmingham, Alabama.

ECONOMIC EFFECTS OF DISCRIMINATORY FREIGHT RATES

FRANK L. BARTON*

I

During the last decade spokesmen for the South, joined by those for the West, have vigorously asserted that the freight-rate structure of the United States is unjustly discriminatory to the southern and western regions and has inhibited the economic growth and development of those areas. Particularly it is asserted that industrial development has been unduly hindered by the present system of freight rates.

Generally the assertions of discrimination do not apply to *all* freight rates paid by shippers in the South and West, but are usually directed at the basic freight-rate structure, the class rates. These, to a great extent, are used for the movement of freight traffic of relatively high value, including manufactured goods.

A brief description of class rates and other types of freight rates making up the freight-rate structure is necessary for an understanding of the function and relative importance of class rates.

The cost of shipment on class rates in dollars and cents is obtained by the use of two factors. One is a first-class rate scale and the other is a freight classification. The first-class rate scale is a mileage scale, which means that it is divided into mileage blocks, in which the first-class rate increases as the distance increases but in a lesser proportion. For instance, on a given first-class rate scale for a haul of 50 miles the charge would be 47 cents per 100 pounds; for 100 miles, 62 cents; for 400 miles, 109 cents; and for 1,000 miles the charge is 182 cents.

A freight classification, the second element, is a list containing a description of almost every commodity moving as freight and the class or classes to which it is assigned—that is, its classification rating or ratings. One commodity usually has more than one rating, depending on volume and conditions of shipment. Each rating is indicated by a number, letter, or number-letter symbol. First class, known also as class 100, is the standard class, and the remaining classes are related to it by percentages. For example, articles given a classification rating of second class, which is 85 per cent of first class, move at 85 per cent of the first-class rate, while those assigned third class, 70 per cent of first class, pay 70 per cent of the first-class rate,

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and so on. Each freight classification has a number of standard or regular classes. An obvious advantage of the use of a freight classification is the grouping of a large number of items into a limited number of classes, thereby avoiding the necessity of publishing freight tariffs containing every charge for each commodity for every possible distance and for every possible volume and kind of packing. In the freight classification is also a statement of the regulations governing the carrier-shipper relationship, packing specifications, and minimum weights applicable to freight shipments.

Thus, it is important to remember that neither the classification nor the individual rating contained in it determines what the shipper must pay for a shipment. The cost will depend on the first-class rates (published separately in the form of a rate schedule containing the cost, or price, per 100 pounds of moving first-class freight each possible distance it may be moved), plus the use of the appropriate class from the freight classification. To ascertain the freight charges on a given shipment moving on class rates, the first step is to look up the article in the classification, discover its proper classification rating, then to look in the class-rate tariff for the cost of shipment for the distance involved at the first-class rate, and then to apply the percentage of first class indicated by the classification rating to the first-class rate. This is over-simplification, but it illustrates the interrelation between the first-class rate scale and freight classification.

From the foregoing discussion it must not be assumed that all freight traffic, or even a large part of it, moves on class rates. There are three other kinds of freight rates on which far more freight traffic moves:

(1) *Exception rates* are rates resulting from exceptions to the classification. Exceptions are of two types: those that transfer the ratings on an article from one standard class to another, and those that utilize percentages of first class other than those used for the standard classes. The latter are known as intermediate columns.

(2) *Commodity rates* are special rates set up for specific movements of particular commodities, which remove the commodities entirely from any relationship to the classes to which they are assigned in the classification.

(3) *Column rates* are rates which apply to specific commodities, or groups of commodities, and are fixed by percentage relationships to the first-class rates by other than standard class percentages.[1]

Class rates, however, will be dealt with almost exclusively in this paper. The others will be mentioned from time to time in their relation to class rates. Exception, commodity, and column rates are generally lower than the class rates, and on them moves most of the freight traffic of the United States.

[1] In Class Rate Investigation, 1939, 262 I.C.C. 447, 562 (1945), definitions of the various types of rates may be found that are as unsatisfactory as the definitions given above. One of the handicaps in the field of freight rates is the inexactness and looseness of the terminology. The writer prefers that two kinds of rates be designated: class rates, consisting of those rates obtained by application of classification ratings to the appropriate class-rate scales; and commodity rates, whether published as exceptions to the classification or as column rates.

The Interstate Commerce Commission has compiled what it chooses to term a "rough approximation" of the relative importance of carload traffic moving on the various types of rates, based on a sample study. These data are set forth in Table 1.

From Table 1 it may be seen that class rates apply on the movement of a relatively small amount of the nation's freight traffic—only slightly over 4 per cent. Within western trunk-line territory, for instance, only 0.6 per cent of the traffic moves

TABLE 1

DISTRIBUTION OF CARLOAD FREIGHT TRAFFIC ON SEPTEMBER 23, 1942, MOVING ON CLASS, EXCEPTION, AND COMMODITY RATES WITHIN MAJOR RATE TERRITORIES AND INTERTERRITORIALLY IN THE UNITED STATES

Type of Rate	Per cent of Carloads	Per cent of Revenue
Class	4.1	6.3
Exception	10.7	16.1
Commodity	85.2	77.6

Territories (within, or from one to another)	Class Rates	Exception Rates	Commodity Rates
	Per cent	*Per cent*	*Per cent*
Official	5.8	17.6	76.7
Southern	1.8	6.0	92.2
Western trunk-line	0.6	0.2	99.2
Southwestern	2.4	4.4	93.2
Mountain-Pacific	1.7	*	98.3
Official to southern	12.6	36.3	51.1
Southern to official	0.9	4.9	94.2
Official to western trunk-line	12.3	35.4	52.3
Western trunk-line to official	3.1	1.0	95.1
Official to southwestern	22.5	52.0	25.5
Southwestern to official	1.5	3.4	95.9
Official to mountain-Pacific	11.3	*	88.7
Mountain-Pacific to official	0.7	....	99.3
Southern to western trunk-line	1.5	13.5	85.0
Western trunk-line to southern	6.1	3.1	90.8
Southern to southwestern	6.1	22.1	71.8
Southwestern to southern	1.2	4.3	94.5
Southern to mountain-Pacific	4.1	4.9	91.0
Mountain-Pacific to southern	1.5	0	98.5
Western trunk-line to southwestern	13.0	6.2	80.8
Southwestern to western trunk-line	2.0	3.0	95.0
Western trunk-line to mountain-Pacific	2.6	0	97.4
Mountain-Pacific to western trunk-line	0.7	0	99.3
Southwestern to mountain-Pacific	3.9	0	96.1
Mountain-Pacific to southwestern	2.1	0	97.9
All territories to official	4.8	14.4	80.8
Official to all territories	6.7	19.4	73.9
All territories to southern	4.1	11.9	84.0
Southern to all territories	2.1	6.2	91.7
All territories to western trunk-line	2.3	5.4	92.3
Western trunk-line to all territories	1.7	0.6	97.7
All territories to southwestern	5.6	10.6	83.8
Southwestern to all territories	2.0	3.9	94.1
All territories to mountain-Pacific	3.3	0.2	96.5
Mountain-Pacific to all territories	1.5	*	98.5
All territories to all territories	4.1	10.7	85.2

Source: *Class Rate Investigation, 1939*, 262 ICC 447, 479, 564 (1945).
* Less than 0.05 per cent.

on class rates. An examination of the relative levels and patterns of class rates applying within and between territories indicates why the use of class rates is extremely limited.

II

From a physical standpoint the railroads of the United States are a single system. As far as the standard-gauge railroads reach, carloads of freight loaded at any point can be delivered to any other point without unloading and reloading on the way. But the uniformity that marks the mechanics of service does not extend to the class rates.[2] For rate-making purposes the United States is regionalized, being divided into five major territories: eastern (or official), southern, southwestern, western trunk-line, and mountain-Pacific. Each of these territories, with its sub-territories, is shown on the frontispiece.

For freight classification purposes the country is divided into three major territories: eastern or official, southern, and western. Official and southern rate territories are roughly co-extensive with the corresponding classification territories. Western classification territory embraces the entire area west of the Mississippi River.[3]

Each of the freight-rate territories has its own level and scheme of class rates applicable to movements of freight traffic moving entirely within a territory. These rates are designated *intraterritorial* class rates. A comparison of the intraterritorial first-class rate scales, both in cents and percentage of eastern, applicable within eastern, southern, and western trunk-line territories, using 50-mile blocks up to 200 miles and 100-mile blocks up to 1,000 miles, is shown in Table 2.[4]

Even though the first-class rate scales are extremely important as indicating the levels of class rates in the various rate territories because they are the basis for formulating other class rates and many exception and column rates, they cannot be accepted as an absolute measure. To obtain a composite intraterritorial class-rate level for each territory, the Tennessee Valley Authority included a chart in one of its studies in which the various factors were taken into account.[5] Using the same procedure with more recent data compiled by the southern territory railroads,[6] the following levels of intraterritorial class rates were obtained: official, 100; southern, 137; western trunk-line, 146; southwestern, 161; and mountain-Pacific, 171. These different rate levels applicable in the rate territories are shown graphically in the map on page 511. Without question official territory has a distinct advantage in intraterritorial class rates.

[2] Neither is there national uniformity in freight rates other than class rates.

[3] A detailed description of the classification territories and the class rates governed by each classification is found at 262 I.C.C. 447, 456-459 (1945). A fourth classification, Illinois Freight Classification, having limited application is not dealt with here.

[4] These and other rates shown are those in force in May, 1945, and do not include general increases subsequently granted by the Interstate Commerce Commission.

[5] THE INTERTERRITORIAL FREIGHT RATE PROBLEM OF THE UNITED STATES, H. R. Doc. No. 264, 75th Cong., 1st Sess. (1937). The statistical technique employed is described on pp. 11-13.

[6] Transcript of Record, States of New York, Delaware, *et al.* v. United States, *et al.*, Supreme Court of the United States, October Term, 1946, Exhibit 42, 6765, 1929.

INTRATERRITORIAL CLASS RATE LEVELS

TERRITORY	ACTUAL	USED	LAYERS*
OFFICIAL	100	100	0
SOUTHERN	137	140	4
WESTERN TRUNK-LINE	146	150	5
SOUTHWESTERN	161	160	6
MOUNTAIN PACIFIC	171	170	7

*EACH LAYER REPRESENTS AN INCREASE OF 10% OVER THE OFFICIAL LEVEL.

TABLE 2

COMPARISON OF FIRST-CLASS INTRATERRITORIAL RATES APPLYING WITHIN EASTERN, SOUTHERN, AND WESTERN TRUNK-LINE RATE TERRITORIES
(Rates stated in cents per 100 pounds)

Distance	Official Scale Rate	Southern Scale		Western Trunk-Line Scale					
				Zone I		Zone II		Zone III	
		Rate	Percentage of Official	Rate	Percentage of Official	Rate	Percentage of Official	Rate	Percentage of Official
50 miles	47	57	121.3	53	112.8	61	129.8	65	138.3
100 miles	62	79	127.4	73	117.7	83	133.9	90	145.2
150 miles	73	96	131.5	86	117.8	98	134.2	107	146.6
200 miles	80	112	140	97	121.3	111	138.8	123	153.8
300 miles	96	134	139.6	117	121.9	134	139.6	147	153.1
400 miles	100	156	143.1	136	124.8	156	143.1	172	157.8
500 miles	122	173	141.8	156	127.9	178	145.9	196	160.7
600 miles	135	189	140	176	130.4	200	148.1	220	163
700 miles	149	206	138.3	196	131.5	222	149	244	163.8
800 miles	160	222	138.8	210	131.3	239	149.4	263	164.4
900 miles	171	235	137.4	226	132.2	256	149.7	282	164.9
1,000 miles	182	249	136.8	240	131.9	273	150	300	164.8
Average	...	...	137.7	...	129.6	...	144.4	...	159.4

Interterritorial class-rate structures are much more complicated than the intraterritorial ones. These interterritorial rates have been the source of many of the complaints which the South and West have directed at class rates. It is asserted that the eastern-territory producer has a great advantage for reaching the rich markets of official territory when his rates are compared with the higher class rates that must be paid by producers in the South and West for hauls of equal length to reach these same markets.

As has been pointed out, each rate territory has its own level and scheme of intraterritorial class rates; consequently, the rate structures do not fit together at the boundaries and are unsuited for moving traffic from one territory to another. A separate interterritorial rate structure applies between official and southern territories, another applies between western trunk-line and official, still another between southern and southwestern territories, and so on. These structures are extremely complex and reflect the patchwork of numerous attempts to adapt the present class-rate structures to a national flow of traffic in the United States—something for which they are totally unsuited. No explanation will be attempted here of the technicalities of interterritorial class rates because of the great amount of space required to make even a comparatively brief exposition.

Two practices are generally followed in constructing interterritorial class rates. The first is the use of a distance scale, or scales, of rates with the charge levied for the movement of freight depending on the distance traversed by the haul in each of the territories involved. The other is the use of "key-point" rates to apply between

groups of points in one territory and points similarly grouped in another territory. Both of these practices generally produce an interterritorial scale of rates that is intermediate to the class-rate levels applying within the two territories between which the interritorial class rates apply.

To illustrate: Table 2 shows that on an intraterritorial movement within official territory of 800 miles a rate of $1.60 per 100 pounds applies, while for the same distance within southern territory the rate is $2.22. If the haul is interterritorial, with 600 miles in official and 200 miles in southern, the rate is $2.00, or 40 cents higher than the official intraterritorial rate for 800 miles and 22 cents lower than an 800 mile haul entirely within southern territory.

Examples of interterritorial first-class rates from points in the South and West to official territory, as compared with intraterritorial first-class rates for approximately equal distances within official territory, show the disadvantages borne by the southern and western shipper attempting to market his product in official territory. Table 3 illustrates these disadvantages for hauls of equal, or nearly equal, length. The first comparison, for example, shows that the Nashville shipper pays 39 cents more on each 100 pounds of freight rated first class to Indianapolis, Indiana, than the shipper at Kent, Ohio (the distance being practically the same), a disadvantage of 41 per cent.

Obviously, the class rates do not represent the actual general level of freight rates actually paid by shippers for freight transportation either within the various territories or between them. The extensive use of exception rates, commodity rates, and column rates lowers the level of freight rates actually paid to something considerably less than the class-rate levels. There is no data available showing accurately either intraterritorial or interterritorial general freight-rate levels or the level of the exception, commodity, and column rates applicable within and between the various rate territories.[7]

Defenders of the present rate structure claim that these lower rates available in the South and West on many products shipped, particularly low-value, heavy-loading commodities, offset the disadvantages of higher class rates paid by shippers in those territories. Even if this were true, it is cold comfort to one wishing to establish an industry in a southern or western location for the production of high-grade manufactured products, that move on class rates or rates closely akin thereto, to be told that the average level of rates in his territory is lower than the class rates because of low commodity rates on logs, iron ore, phosphate rock, and the like. An average freight-rate level is as unsatisfactory to one paying higher-than-average rates as average life-expectancy figures are to one suffering from tuberculosis or cancer. Statistically the figures may be extremely satisfactory, but practically they offer no relief in an individual case.

The Board of Investigation and Research, established by the Transportation Act of 1940 to study transportation problems, observed that examinations of interterritorial

[7] The staff of the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission are gathering data on a sample basis from which such information may be available.

commodity rates "demonstrate the wide variations in the structures,"[8] which is another way of saying that no general statement of accurate nature can be made concerning the levels of commodity rates applying interterritorially. On commodity rates of intraterritorial application the board concluded from its analysis of a number of these commodity rates that "on most of the commodities there are substantial

TABLE 3

COMPARISON OF FIRST-CLASS INTERTERRITORIAL RATES FROM POINTS IN SOUTHERN, SOUTHWESTERN, AND WESTERN TRUNK-LINE TERRITORIES TO OFFICIAL TERRITORY WITH CORRESPONDING RATES WITHIN OFFICIAL TERRITORY FOR APPROXIMATELY EQUAL DISTANCES
(Rates stated in cents per 100 pounds)

From Southern to Official Compared with Official		Miles	First Class Rates	Disadvantage of Southern Shipper Compared with Official Territory Shipper	
From	To			In cents	In per cent
Nashville, Tenn.	Indianapolis, Ind.	297	135	..	..
Kent, Ohio	Indianapolis, Ind.	296	96	39	41
Knoxville, Tenn.	Columbus, Ohio	395	155	..	..
Baltimore, Md.	Warren, Ohio	392	103	52	50
Birmingham, Ala.	Muncie, Indiana	536	179	..	..
Pittsburgh, Pa.	Rockford, Ill.	538	128	51	40
Chattanooga, Tenn.	Chicago, Ill.	594	187	..	..
Philadelphia, Pa.	Toledo, Ohio	595	135	52	39
Atlanta, Ga.	Chicago, Ill.	731	210	..	..
Danville, Ill.	Washington, D. C.	733	151	59	39
Macon, Ga.	Chicago, Ill.	819	223	..	..
Trenton, N. J.	Danville, Ill.	819	163	60	37

Source: Transcript of Record, *States of New York, Delaware, et al.* v. *United States, et al.*, Supreme Court of the United States, No. 343, October Term, 1946. Exhibit 88, pp. 8138-9, 2578.

From Southwestern to Official Compared with Official		Miles	First Class Rates	Disadvantage of Southwestern Territory Shipper Compared with Official Territory Shipper	
From	To			In cents	In per cent
Little Rock, Ark.	Detroit, Mich.	785	222	..	..
Official Territory Point	Detroit, Mich.	785	160	62	39
Oklahoma City, Okla.	Cincinnati, O.	882	244	..	..
Official Territory Point	Cincinnati, O.	882	171	73	43
Shreveport, La.	Cleveland, O.	1,013	264	..	..
Official Territory Point	Cleveland, O.	1,013	185	79	43
Dallas, Texas	Pittsburgh, Pa.	1,224	304	..	..
Official Territory Point	Pittsburgh, Pa.	1,224	207	97	47

Source: *Id.*, Exhibit 96, at 8534, 2746.

[8] BOARD OF INVESTIGATION AND RESEARCH, REPORT ON INTERTERRITORIAL FREIGHT RATES, H. R. DOC. No. 303, 78th Cong., 1st Sess. 219 (1943).

From Western Trunk-Line to Official Compared with Official		Miles	First Class Rates	Disadvantage of Western Trunk-Line Territory Shipper Compared with Official Territory Shipper	
From	To			In cents	In per cent
Des Moines, Iowa	Toledo, Ohio	558	142	..	..
Official Territory Point	Toledo, Ohio	558	118	24	20
St. Paul, Minn.	South Bend, Ind.	491	138	..	..
Official Territory Point	South Bend, Ind.	491	111	27	24
Lincoln, Nebr.	Evansville, Ind.	612	169	..	..
Official Territory Point	Evansville, Ind.	612	125	44	35
Denver, Colo.	Cleveland, Ohio	1,329	289	..	..
Official Territory Point	Cleveland, Ohio	1,329	200	89	45

Source: *Id.*, Exhibit 64, at 7556-9, 2175.

regional differences in the levels, with higher rates in the South and West than in eastern territory."[9]

An indication of the relative levels of rates actually paid on manufactured products may be obtained by comparing railroad freight revenue on this traffic with fully distributed costs applicable thereto. Manufactured goods are included in "Group V—Manufactures and Miscellaneous (Carload)" in the Interstate Commerce Commission's commodity statistics. For the year 1939 on this group the ratio of revenue to fully distributed costs in the eastern district was 121 per cent; in the southern region, 130 per cent; and in the western district, 119 per cent.[10] In view of the fact that the cost of railroad operation is about the same in the South as in the East, or slightly lower, these figures are significant in that they show the traffic in Group V bears a greater proportion of the total transportation burden in the South than in the eastern district. That is, traffic in this group contributes substantially more to the constant cost of railroad operation in the South than in the East. This substantially heavier contribution is obtained by the payment of a higher aggregate level of rates on manufactures and miscellaneous in the South than in the East.

And how, one may logically inquire at this point, did the freight-rate structure of the United States acquire its present marked characteristic of regionalism, with such differences between the territories? While there are many factors that should necessarily enter into a complete answer to this question, in general it may be said that official territory has always been the most important manufacturing region, and the official railroads naturally developed a rate structure favorable to the movement of finished products. On the other hand, the South and West specialized in the production of raw materials and semi-finished products, and the freight-rate structures in those regions were shaped to give favorable rates to such items. The lack of manufacturing there accounts in part for the higher rates on manufactured goods.

[9] *Id.* at 148.

[10] Transcript of Record, States of New York, Delaware, *et al.* v. United States *et al.*, cited *supra*, note 6, at 11403.

Beginning in the 1920's the Interstate Commerce Commission conducted investigations of freight rates territory by territory, with the exception of mountain-Pacific territory, the rates of which have not as yet been subjected to a comprehensive investigation. The class rates prescribed by the Commission in each territory followed to a great extent those rates in use by the railroads, with some of the gross inequities removed. In southern territory, for instance, simplification of the rate structures seemed to be the prime object of the Commission's action. The simplification consisted mainly of removing the old basing-point system of rate making in the South and elimination of the "outer" class and commodity rates. The early characteristics of the rate structure in each region thus became permanent with Commission approval. Relatively high rates on finished goods in the South and West were one of the characteristics of the structure. Economic practices, once they have become established, are often extremely difficult to change.

Prior to World War I the official territory carriers followed the policy of concurring in low levels of rates to allow relatively small movements of southern manufactured products to official territory. Upon the termination of Federal control in 1920 the official carriers discontinued this policy, an action which resulted in the now famous statement by a prominent railroad official of the South that the official railroads' policy is to build a rate wall at the Ohio and Potomac rivers which will prevent or greatly curtail the movement of southern products into official territory.[11]

An equally famous pronouncement of policy has been made by the official carriers as a group, in which they stated that they are "in duty bound" to protect producers located on their lines by excluding from official territory competitive products originating in the South and West.[12] By this policy the official lines are trying to retain as much revenue as possible for themselves—a natural desire. That is, they prefer the long hauls and greater revenue accompanying the intraterritorial movement of manufactured products produced in official territory to shorter hauls and divided revenues incident to the movement of similar goods originating in southern territory. Longer hauls and greater revenues accrue to official carriers on products moving from Cincinnati and Chicago to New York, for instance, than would result from shorter hauls and divided revenues obtained by taking similar traffic from southern territory at Potomac Yard, near Washington, or other gateways, for movement to New York. Also, it is more profitable for official carriers to move raw materials from the South and West into official territory with return hauls of finished products to those territories than it is to have a single inbound haul of finished products from the South or West.

III

As industrial production increased in the South and West it followed that there would be attempts to market some of these products in the thickly populated areas

[11] Transcript of testimony, Interstate Commerce Commission Finance Docket 10294, 2124 (1931).

[12] Brief for official carriers filed with the Interstate Commerce Commission in *Ex parte* 116—Interterritorial Rate Bases (1935).

in official territory. It also followed that these products would be excluded, or forced to enter official markets under substantial handicaps, because of the high levels of interterritorial class rates and the refusal of official carriers to concur in a level of rates comparable to that applying on such goods moving intraterritorially within official territory.

While neither the South nor the West has made any great strides relatively in increasing industrial production, greater absolute amounts of finished goods were produced after World War I in both regions. Table 4 shows comparative figures on the relative status of the various rate territories in population and value of manufactures. While there have been some changes, official territory has maintained a dominant position in population and value of manufactures.

TABLE 4

A. POPULATION OF THE FREIGHT-RATE TERRITORIES OF THE UNITED STATES

Rate Territory	Thousands of Persons						Percentage of Total U. S. Population					
	1890	1900	1910	1920	1930	1940	1890	1900	1910	1920	1930	1940
Official	32,540	38,796	46,159	53,594	62,499	67,186	51.69	51.05	50.19	50.70	50.90	51.03
Southern	12,118	14,327	16,419	18,068	20,357	22,728	19.25	18.85	17.85	17.09	16.58	17.26
Southwestern	4,381	6,103	8,271	9,636	11,477	12,236	6.96	8.03	8.99	9.12	9.35	9.29
Western trunk-line	11,059	12,985	14,817	16,171	17,283	16,184	17.57	17.09	16.11	15.30	14.08	12.29
Mountain-Pacific	2,849	3,784	6,306	8,241	11,159	13,335	4.53	4.98	6.86	7.79	9.09	10.13
Total, United States	62,948	75,995	91,972	105,711	122,775	131,669	100.00	100.00	100.00	100.00	100.00	100.00

Source: United States Census, 1890, 1900, 1910, 1920, 1930, and 1940.

B. VALUE OF MANUFACTURES BY FREIGHT-RATE TERRITORIES OF THE UNITED STATES

Rate Territory	Millions of Dollars						Percentage of Total Value for U. S.					
	1909	1919	1929	1933	1935	1937	1909	1919	1929	1933	1935	1937
Official	14,959	46,322	51,333	22,317	32,785	43,491	72.36	74.21	72.88	71.16	71.65	71.63
Southern	1,355	4,228	5,045	2,824	3,877	5,109	6.56	6.77	7.16	9.01	8.47	8.42
Southwestern	551	2,053	2,574	1,167	1,768	2,399	2.66	3.29	3.65	3.72	3.86	3.95
Western trunk-line	2,658	5,859	6,070	2,699	3,888	4,948	12.86	9.39	8.62	8.61	8.50	8.15
Mountain-Pacific	1,149	3,956	5,413	2,352	3,441	4,766	5.56	6.34	7.69	7.50	7.52	7.85
Total, United States	20,672	62,418	70,434	31,359	45,760	60,713	100.00	100.00	100.00	100.00	100.00	100.00

Source: Manufactures Section, United States Census, 1910, 1920, 1930; Biennial Census of Manufactures, 1933, 1935, 1937.

Although official territory is predominantly industrial, and also has a large percentage of other highly paid occupations, the South and West are much more dependent on agriculture and the extractive industries as sources of employment for workers.[13] Average income in the rate territories reflects these differences in occupation. In 1940, for example, the average dollar income per capita was $701 in official, $313 in southern, $374 in southwestern, $469 in western trunk-line, and $694 in mountain-Pacific.[14] These typical income figures, plus exercise of the ordinary

[13] *Report on Interterritorial Freight Rates*, cited *supra*, note 8, at 227.

[14] REGIONALIZED FREIGHT RATES: BARRIER TO NATIONAL PRODUCTIVENESS, H. R. Doc. No. 137, 78th Cong., 1st Sess. 23 (1943).

powers of observation and reasoning by anyone who is even reasonably well acquainted with the economics of official territory and the southern and western rate territories, inevitably lead to the conclusion that most of the South and West are sadly in need of economic activities that will bolster up their low income status. Both the South and the West have decided that an increase in types and amounts of industrial production is the solution to their economic problems.

World War II gave parts of the South and West, that had never before had industry, a taste of the sweets of the income from industrial production, tending to whet the economic appetite of those formerly accustomed to a low income status.

In the course of the numerous economic analyses that were made in the 1930's it was disclosed that, among other handicaps to increased industrial production, the class-rate structure was unfavorable to both the South and the West. This rate discrimination, particularly as it affected the South, caught the public imagination. Almost everyone who spoke or wrote on southern economics brought in the subject of unfavorable "freight-rate differentials."[15] Some, in referring to the handicaps faced by the South, probably gave too much weight to the importance of freight rates as a deterrent to southern economic well-being. Others over-simplified the condition by saying, for instance, that it is cheaper to ship manufactured goods from New York to Atlanta than it is to ship these same goods from Atlanta to New York. To the extent that class rates apply this is untrue because the class rates are the same between the two points.

The proper statement is that a haul from Atlanta to New York on a class rate is costlier than a haul of equal length from some official territory point to New York. Conversely, a movement from New York to Atlanta on a class rate is at a lower class rate than a movement of equal mileage from a southern territory point to Atlanta. Nevertheless, it became known to many that the rate structure somehow placed the southern shipper at a disadvantage in comparison with the more fortunate official territory shipper. While his conception might not have been technically perfect, the man on the street became aware that the South was unfairly burdened with a freight-rate handicap.

Regardless of the over-emphasis placed on the importance of the rate handicap or the mistakes made in defining it, those in the South had a specific problem and a grievance capable of solution by legislation, the Interstate Commerce Commission, or the courts. The handicap is a man-made one. In this respect the problem differs from some southern problems that are based on custom or natural conditions that neither legislatures nor courts can correct. No one can evaluate with exactitude the part the freight-rate structure has played in retarding southern economic development, but it is known that it is a deterring factor for which there is no apparent justification. This feeling is based to some extent on cost studies made by the Interstate Commerce Commission, and others, that show little difference between the cost

[15] Freight-rate differences is a more nearly accurate term, as freight rate differentials are technically the amounts added to or subtracted from one freight rate to obtain another freight rate.

to the railroads of rendering transportation service in official and southern territories.

The demand for class-rate equalization with official territory swept the South and spread to the West. Bills were introduced into Congress providing for national freight-rate equalization, none of which passed either the House or the Senate. The demand for rate equalization was expressed, however, in the Transportation Act of 1940 by one provision making unlawful any undue or unreasonable preference or advantage to any region, district, or territory; and by another provision authorizing and directing the Interstate Commerce Commission to institute an investigation into rates by rail or water on manufactured products, agricultural commodities, and raw materials, both on intraterritorial and interterritorial movements, for the purpose of removal of unlawfulness found to exist.[16]

Whether the regional differences in economic activity and well-being in the country are the cause or the effect of differences in freight rates has been naturally the subject of warm discussion; such discussions always accompany any proposed readjustment of economic advantage. This apt answer, that should be pleasing to those on either side of the discussion, has been given:

> The truth of the matter is that the freight rates are both cause and effect. If they did not have the effect of aiding producers in the areas concerned it would not be necessary to grant favorable freight rates to them. The result of the situation described is that the rate structure tends to perpetuate the particular regional specialization which has existed in an area. Newer economic interests in an area must frequently make their way against rate handicaps growing out of the prevailing rate adjustments.[17]

In 1939, in anticipation of passage by the Congress of legislation such as was embodied in the Transportation Act of 1940, the Interstate Commerce Commission announced two general investigations. One was an investigation into class rates applying in and between official, southern, southwestern, and western trunk-line territories, which is the area lying east of the Rocky Mountains.[18] The other was an investigation into freight classification in the entire United States.[19] Because of the interdependence of class rates and freight classification the two proceedings were heard together and commonly designated "The Class Rate Investigation."

In May, 1945, the Interstate Commerce Commission, after exhaustive hearings, filed its report and order.[20] The findings vindicated the exponents of class-rate revision for the South and West. Concerning freight classification the Commission found that the existing classifications are unlawful and will continue so until national uniformity of classification is accomplished. The railroads were given the opportunity to prepare a uniform classification, which they have agreed to do. In addition,

[16] 24 STAT. 380 (1887), as amended, 49 U. S. C. §3(1) (1940); 54 STAT. 902, 49 U. S. C., note following §3 (1940).

[17] *Report on Interterritorial Freight Rates*, cited *supra*, note 8, at 224.

[18] Interstate Commerce Commission Docket 28300, Class Rate Investigation, 1939, 262 I.C.C. 447 (1945).

[19] Interstate Commerce Commission Docket 28310, Consolidated Freight Classification, 262 I.C.C. 447 (1945).

[20] 262 I.C.C. 447 (1945); supplemented by 264 I.C.C. 41 (1945).

the Commission found that both the intraterritorial and interterritorial rates applicable east of the Rockies violate sections 1(4) and (5)(a) of the Interstate Commerce Act;[21] and that the relation between interterritorial class rates applying to official territory from the other territories involved, on the one hand, and the intraterritorial class rates applicable within official territory, on the other hand, results in an unreasonable preference to official territory, and to official-territory shippers and receivers of freight, in violation of section 3(1) of the Interstate Commerce Act.[22] Further it was found that the unlawfulness of these rates will be remedied by class rates based on a scale set out in Appendix 10 to the Commission's original report when adopted in conjunction with the new uniform classification, the standards for which the Commission set forth in the report. The findings were bolstered by elaborate cost studies made by the Commission's staff showing the cost of rendering rail service in official and southern territories to be on almost the same level, and only slightly higher in the West.

To provide some measure of immediate relief an interim order was issued providing for a 10 per cent decrease in rail class rates for all interstate shipments made east of the Rocky Mountains and a 10 per cent increase for interstate shipments within official territory. Before the rates could be filed and become effective, the official territory states, later joined by most of the western railroads, filed a petition in the District Court of the United States for the Northern District of New York seeking to set aside the reports and orders of the Interstate Commerce Commission and seeking an interlocutory injunction pending the hearing and determination of the case.[23] The injunction was granted late in 1945. The special three-judge statutory court in May, 1946, upheld the Commission but continued the interlocutory injunction until final determination of the case on appeal.[24] The appeal is pending before the Supreme Court as this is written.[25]

IV

In the evidence adduced during the hearings held by the Commission in the *Class Rate Investigation* there are numerous specific instances of actual discrimination against the South and West. In some cases the economic effects of these rates are measured by relating the handicap suffered to the various economic factors involved in the business. The Interstate Commerce Commission found this evidence convincing, particularly in light of the exhaustive cost studies presented by the Commission's staff showing cost of railroad operation in the South and in official territory to be about the same and to be only slightly higher in the West. These cost

[21] 24 STAT. 379 (1887), as amended, 49 U. S. C. §1(4), §5(a) (1940).
[22] 24 STAT. 380 (1887), as amended, 49 U. S. C. §3(1) (1940).
[23] States of New York, Delaware, *et al.* v. United States, *et al.*, Civil No. 2311.
[24] State of New York v. United States, 65 F. Supp. 856 (1945).
[25] The States of New York, Delaware, *et al.*, Appellants v. United States *et al.*, No. 343; The Honorable Horace A. Hildreth, Governor of the State of Maine, *et al.*, Appellants, v. United States, *et al.*, No. 344; The Atchison, Topeka & Santa Fe Railway, *et al.*, Appellants, v. United States, *et al.*, No. 345, Supreme Court of the United States, October Term, 1946. [Decided May 12, 1947. See the FOREWORD to this symposium. Ed.]

data exploded one of the bits of the folk-lore of transportation, long-cherished, that transportation conditions are less favorable in southern than in official territory.

As had been claimed in the South and West, from the Commission's findings it has been established in regard to movements of traffic on class rates that manufactured articles from the South and West, when moved to official territory, generally meet competition from producers of similar articles located within official territory who can reach the same markets on official intraterritorial rates that are substantially lower, mile for mile, than the interterritorial rates which the southern and western shippers must pay. An attempt to meet such competition generally results in a deduction from the price received for the product by the producer in the South or West because of greater freight charges paid. This difference must either be absorbed by the southern or western manufacturer, resulting in a reduction in his profit, or be passed on in the form of lower wages to his employees or a lower price for the raw materials used in the product. These differences in freight rates, when expressed in terms of net profit, are frequently substantial, and may mean the difference between a profitable and an unprofitable business venture.

Thus, manufacturing in the South and West is discouraged and impeded, despite the fact that, with the exception of nearness to markets, all the economic factors for industrial development are present in these regions.

From the record made in the *Class Rate Investigation* the following cases are taken, showing the economic effects of discriminatory rates on the South and West in specific competitive situations.

A Kansas manufacturer of coal-preparation plants and washeries must absorb in competitive bidding the differences in class-rate levels which favor the manufacturers in official territory. On the official basis the rates are 40 per cent of first-class, whereas from Kansas to official territory the charges actually paid are 45 per cent of a much higher interterritorial first-class rate scale. Solely because of this rate inequality, this company is considering moving its plant to Cincinnati, Ohio, where possible sites for a new location have been offered, in order to get the lower official rates.

This Kansas company is now shipping to coal operators in Indiana, Kentucky, West Virginia, Ohio, and Pennsylvania, but has experienced great difficulty in meeting competition from official territory because of the higher freight rates. It has had to forego business in Pittsburgh, Pennsylvania, because of the rates, and has lost business to Link-Belt of Chicago for the same reason.[26]

A Wichita, Kansas, manufacturer[27] of heating appliances which move on class rates, including large and heavy heating units like furnaces, competes with manufacturers in Ohio, Illinois, Kentucky, Pennsylvania, New York, and Michigan. Between 1930 and 1941 some 442 cars of his product were moved into official territory under applicable class rates. This Kansas manufacturer, shipping gas or gasoline

[26] Transcript of Record, States of New York, Delaware, *et al.* v. United States, *et al.*, cited *supra*, note 6, at 2931-2937.

[27] *Id.* at 3235-3243; *id.*, Exhibit 142, at 9754-9758, 3241.

stoves to Chicago in carloads having a minimum weight of 16,000 pounds, pays $1.10 per 100 pounds as compared with the Pittsburgh producer's rate of 59 cents on similar shipments. He is also at a disadvantage in shipping house heating furnaces to Chicago. His rate is 75 cents per 100 pounds, while the Pittsburgh shipper enjoys a rate of 41 cents. Chicago is 454 miles from Pittsburgh and 579 miles from Wichita.

Oil-well supplies move on class rates and are manufactured at Parkersburg, West Virginia, Fort Worth, Texas, and Tulsa, Oklahoma. The rate from Fort Worth to Centralia, in the Illinois oil fields, is 99 cents per 100 pounds, 45 cents higher than if the official scale, column 35, which Parkersburg uses, is applied. On an average car of 40,000 pounds, there is a difference of $180.00 per car. From Tulsa to New Iberia, Louisiana, the rate is 47 cents per 100 pounds higher than the official scale rate. The rate from Parkersburg to New Iberia is $1.19; if the official scale were applicable, the rate would be 69 cents per 100 pounds.[28]

A transportation and industry expert from the University of Texas analyzed the economic effects of freight rates on five concerns in Texas, using their paid freight bills,[29] and his Exhibit 104[30] contains convincing data showing numerous rate inequalities that inhibit southwestern industries.

The freight bills on the shipments made by and to the industries in the Southwest, compared with the rates that would have been applied, inbound and outbound, on the same articles for similar distances within official territory, showed that the freight payments of these five concerns exceeded by $83,054.62 the amount that would have been paid had all inbound and outbound shipments been charged on the official basis for equivalent service.

The Sche-Rose Manufacturing Company of Dallas, producers of breadmaking compound, for the year 1941 paid approximately 63 per cent more in freight charges than it would have paid had the official level of rates been applied. A shipment from Dallas to Philadelphia, for example, moved at a class rate of $1.93 per 100 pounds, when the official level would have only been $1.33. The economic disadvantage suffered by this concern for 1941 on the basis of freight charges represented 57.7 per cent of its manufacturing wages, over 6 per cent of its capital stock, 5.9 per cent of net sales, and over 23 per cent of office and administrative salaries. The customers, workers, or stockholders could have enjoyed the savings to be realized in freight charges had the goods moved on the official rate level.[31]

The freight charges on shipments made by the Walker's Austex Chili Company, Austin, Texas, during 1941 were over $14,000 more than would have been charged for equivalent service under the rates in effect in official territory. The economic disadvantages of freight charges for this company when compared with official amounted to 7.31 per cent of its capital stock, 3.29 per cent of cost of goods sold, and 2.12 per cent of net sales.[32]

[28] *Id.* at 2797; Exhibit 102, *id.* at 8610-11, 2802.
[29] *Id.* at 2811-29.
[30] *Id.* at 8629-42, 2820.
[31] *Id.*, Exhibit 104, at 8634, 2820, 2817.
[32] *Id.*, Exhibit 104, at 8630-1, 2820, 2816.

The Superior Products Company, Dallas, manufactures toilet preparations, perfumes, and related articles. Its actual inbound freight charges for the year 1941 amounted to $65,317.39. The charges for equivalent service under the official level of rates would have been only $37,828.22. The total freight charges amounted to over 29 per cent of the cost of the goods sold, 18.29 per cent of net sales, 69.74 per cent of capital invested, and over 300 per cent of wages paid.

To illustrate the drastic differences between the rates that are charged this producer on the present levels, as against the rates under the official basis, one actual shipment consisted of 51,495 pounds of drugs moving from Petrolia, Pennsylvania, to Dallas at a class rate of $1.14 per 100 pounds. The total charge collected was $5,870.49. Under the official level for equivalent service, the same shipment would have moved at a class rate of 75 cents per 100 pounds and the charge would have been only $3,862.16.[33]

A similar case history is revealed by an examination of freight charges paid by the Brenham Cotton Mills, Brenham, Texas. For example, it cost this concern $3.53 per 100 pounds in freight charges to ship textile machinery from Biddeford, Maine, to Brenham. During 1941, numerous shipments were received from Biddeford that moved on this class rate, whereas a rate of $2.48 is applicable on the same articles within official territory for equivalent service.[34]

A Tennessee public official, a rate expert,[35] explained "why it is that Nashville cannot sell work clothing in the North and East, as her rates mile for mile are approximately 31.5 per cent higher than her competitors' in Central Territory."[36] The following rate comparisons were shown:

TABLE 5

COMPARISON OF LESS-CARLOAD RATES ON COTTON WORK CLOTHING FROM NASHVILLE, TENNESSEE, AND APPROXIMATELY EQUIDISTANT POINTS IN OFFICIAL TERRITORY, TO POINTS IN OFFICIAL TERRITORY
(Rates stated in cents per 100 pounds)

Origin	Destination	Miles	Rates
Nashville, Tenn.	Chicago, Ill.	443	106
Pittsburgh, Pa.	Chicago, Ill.	459	82
Nashville, Tenn.	Buffalo, N. Y.	725	137
Alton, Ill.	Buffalo, N. Y.	712	103
Nashville, Tenn.	Boston, Mass.	1178	176
Alton, Ill.	Boston, Mass.	1206	135
Nashville, Tenn.	Detroit, Mich.	545	120
Allentown, Pa.	Detroit, Mich.	585	91
Nashville, Tenn.	Cleveland, Ohio	549	118
New York, N. Y.	Cleveland, Ohio	556	90
Nashville, Tenn.	Grand Rapids, Mich.	537	120
New York, N. Y.	Grand Rapids, Mich.	779	108
Nashville, Tenn.	Indianapolis, Ind.	297	95
Buffalo, N. Y.	Indianapolis, Ind.	468	82

[33] *Id.*, Exhibit 104, at 8633, 2820.
[34] *Id.*, Exhibit 104, at 8632, 2820.
[35] *Id.* at 2601-12.
[36] *Id.* at 2607; Exhibit 91, at 8330, 2608.

A Philadelphia shipper of gas black from the Pennsylvania oil fields pays a rate to St. Louis, a distance of 981 miles, of 64 cents per hundred pounds, whereas from Amarillo, Texas, to Chicago, a distance of 978 miles, the rate is 85 cents per hundred pounds. If Amarillo and Philadelphia both ship to Chicago, the rate from Amarillo is 85 cents and the rate from Philadelphia is 57 cents, a difference of 28 cents per hundred pounds, or $112.00 per car for a difference in distance of only 167 miles in favor of Philadelphia. The distance from Philadelphia to Chicago is 811 miles. The rating is fifth class.[37]

The Sweet Potato Growers, Inc., with a starch plant at Laurel, Mississippi, for the seven months ending February 28, 1941, paid freight charges which amounted to 21.8 per cent more in dollars paid than the official territory level for comparable movements. On carload shipments the excess of actual charges over the official basis was 15.6 per cent and on less-carload shipments the excess amounted to 44.6 per cent.[38] This excess of actual charges was 2 per cent of the total net sales. If this difference in rates paid had been available to the Sweet Potato Growers, Inc., the corporation could have paid either 8 per cent more for raw materials or 10 per cent more in wages, or earned 124 per cent more in net profits.[39]

A manufacturer of automobile truck bodies at Nashville, Tennessee,[40] labors under a rate handicap as high as 253 per cent of the rates available to his competitor at Detroit, Michigan, in the sale of truck bodies at Metuchen, New Jersey.[41] In this case the Nashville rate was made on the southern classification rating of second class—$2.10 per 100 pounds. The Detroit shipper enjoyed rates ranging from 53 cents to $1.03 per 100 pounds, depending upon the carload minimum weight. These rates represent official classification exception ratings applied to the official level of rates.[42] Metuchen is 965 miles from Nashville, and 616 miles from Detroit.

According to an Iowa traffic expert,[43] the level of class rates between official territory and Iowa does not permit Iowa industries to purchase interterritorially, for the same cost, the miles of transportation their competitors across the river can buy within official territory. The present first-class rate between Waterloo or Cedar Falls and Indianapolis, Indiana, is $1.33 for the 415 miles. In official territory this $1.33 will buy 580 miles of transportation, equivalent to the distance from Indianapolis, Indiana, to Omaha, Nebraska. This illustrates the severe rate handicap faced by shippers located adjacent to official territory.[44]

A North Carolina washboard manufacturer's greatest competition is from Michigan and Ohio companies. Lower competitive interterritorial rates have been withheld from his company by the railroads, and therefore, in bidding on a delivered-price basis against competition in official territory, he must absorb the higher freight charges from Raleigh.[45] The less-carload class rates paid on actual shipments from Raleigh, compared below with the rates available within official territory to com-

[37] *Id.* at 2795.
[38] *Id.*, Exhibit 76, at 7981, 2393.
[39] *Id.* at 2386.
[40] *Id.* at 4614-53.
[41] *Id.* at 4635.
[42] *Id.* at 4634.
[43] *Id.* at 3032-51.
[44] *Id.* at 3034.
[45] *Id.* at 2469-73.

petitors for equal service, are representative of the disadvantage of the southern-territory shipper:[46]

TABLE 6

To	Mileage	CLASS RATES IN CENTS PER 100 POUNDS	
		Paid by Raleigh Shipper	Official Basis
Charleston, West Virginia	403	90	78
Chicago, Illinois	862	132	118
Detroit, Michigan	760	124	109
Portland, Maine	831	126	116
Scranton, Pennsylvania	533	101	90
Toledo, Ohio	704	117	106
Wilkes-Barre, Pennsylvania	515	98	87

An official of a tanning company in Andrews, North Carolina, which ships leather products to the North, testified[47] that he had "experienced considerable difficulty in selling and quoting prices in line with prices quoted from tanneries who are in position to ship at lower freight rates."[48]

The significance of certain inbound class-rate discriminations affecting this tannery is illustrated by specific inbound shipments which cost this company 25.7 per cent more in freight charges than would have accrued had the goods moved under official territory rates. The economic disadvantage here, arising out of payments on inbound consignments of dry hides, is emphasized when the applicable fourth-class rates to the following actual shipments[49] are compared with rates for equidistant hauls in official territory:

Shown below[50] is a list of manufactured articles produced in Atlanta, Georgia, that have markets in official territory. These articles move on class rates in both southern and official territories, and the disadvantage of the Georgia producer as compared with the official producer is shown for each commodity in the last column:

TABLE 7

ILLUSTRATIVE SHIPMENTS, DRY HIDES, CARLOAD MINIMUM 20,000 POUNDS
(Class rates stated in cents per 100 pounds)

From	Date	Car No.	Class Rate Formula Miles	CLASS RATES		Revenue Differential (dollars)
				As Applied	Official Basis	
New York, N. Y.	6-10-42	PRR 78932	812	122	84	205.58
New York, N. Y.	6-10-42	PRR 50632	812	122	84	207.86
Waverly, N. J.	6-16-42	PRR 56792	812	122	84	154.66
New York, N. Y.	6-18-42	N-W 46790	812	122	84	158.84

[46] *Id.*, Exhibit 79, at 8015-6, 2472.
[47] *Id.* at 2455-61.
[48] *Id.* at 2457.
[49] *Id.*, Exhibit 77, at 8003, 2459.
[50] *Id.*, Exhibit 220, at 11696, 4765.

TABLE 8

Commodity (carloads, unless otherwise shown)	Classification Ratings Stated as Percentages of First Class			Southern Rate Level (Per Cent of Official)
	Southern	Official	South to Official	
Calendars, paper	55	55	55	138
Electrical appliances: switchboxes, outlet plates, conduit outlet boxes, with or without fittings	LCL 70	70	70	138
	CL 45	40	45	156
Cloths or rags, wiping	40	30	40	180
Tanks, iron or steel, thinner than No. 2 gauge but not thinner than No. 16 gauge	55	55	55	138
Lead products:				
Sheet	30	35	35	138
Pipe and fittings	40	35	40	160
Wine (in tank cars)	55	55	55	138

The Commissioner of the Memphis, Tennessee, Freight Bureau testified as to the movement of macaroni, noodles, and spaghetti from Memphis, and comparative rates.[51] The Memphis manufacturer distributes his goods throughout southern territory, but, with the exception of border points, has been unable to market his goods in official territory in competition with manufacturers at Chicago and St. Louis, because shippers there enjoy rates relatively lower than those applicable from Memphis. He testified that the movement both in southern and official territory was on class rates.[51a]

The rate on macaroni, spaghetti, and noodles, less-carload, from Memphis to Hamilton, Ohio (512 miles), is 82 cents per 100 pounds; the rate from St. Louis, Missouri, to Cleveland, Ohio (522 miles), is 62 cents per 100 pounds.[51b]

Taking Evansville, Indiana, as a representative border-point destination, the rate from Memphis (301 miles) is 70 cents per 100 pounds. From Chicago (284 miles) the rate is 48 cents per 100 pounds. This 22-cent advantage was typical.

The rate from Memphis to Metropolis, Illinois, is 53 cents per 100 pounds for the haul of 179 miles, while the Chicago producer, for the haul of 355 miles, nearly twice as far, enjoys a rate of 52 cents.[52]

On palmetto fiber, used in the manufacture of brushes, the applicable class rates and certain basic scale rates from Jacksonville, Otter Creek, and Benson Junction, Florida, to representative official territory cities, are compared with the applicable import class rates from New York to the same localities.[53] The following tabulation[54] indicates, among other disparities, that a competing manufacturer in St. Louis, 1,027 miles from New York, can get imported fiber from New York at a rate of $1.21, that is, 71 cents less than the rate on Florida fiber from Benson Junction, Florida, to St. Louis, for a comparable haul of 1,029 miles. The Florida producer has a rate disadvantage of 58½ per cent:[55]

[51] *Id.* at 2335-56.
[51a] *Id.* at 2336.
[51b] *Id.*, Exhibit 75, at 2356 uu, 2341.
[52] *Id.* at 2356 vv.
[53] *Id.* at 2651.
[54] *Id.*, Exhibit 92, at 8440-1, 2654.
[55] *Id.* at 2651.

TABLE 9

PALM OR PALMETTO BRUSH FIBER, LESS-CARLOADS
(Rates stated in cents per 100 pounds)

To— (A) Chicago, Ill. (B) St. Louis, Mo. From—	Mileage	Rates Applicable (3d class)	Southern Basic Scale K-2 (3d class)	Official Territory Basis	Amount and Percentage Difference, Applicable Rate Over Official Territory Basis	
					Amount	Percentage
Jacksonville, Fla.....	(A) 1,061	184	181	133	51	38
	(B) 915	172	167	172	50	41
Otter Creek, Fla.....	(A) 1,087	198	183	135	63	47
	(B) 933	181	169	123	58	46
Benson Junction, Fla.....	(A) 1,173	207	190	141	66	47
	(B) 1,029	192	178	131	61	47
New York, N. Y.....	(A) 890	*111	...	120	..	..
	(B) 1,027	*121	...	131	..	..

* Import class rates.

On this traffic another witness,[56] who made studies of the manufacture and distribution of palmetto fiber at these Florida points, testified as follows:

The differences in the rates, and the particularly low rates on imported fibers actually encourage the importation of fibers produced under low wage conditions. Inducement is given to import fibers rather than to use the only domestically produced vegetable brush fiber, Florida palmetto. The domestic fiber, Florida palmetto, suffers the disability of much higher freight rates and its production and usage is thereby curtailed.[57]

Table 10[58] indicates, for example, that fiber brushes manufactured in Florida must overcome a rate handicap of 48½ per cent in competition with the New York to St. Louis rate of 157 cents.

Another witness had this to say about the Florida fiber brush figures:

It is my opinion based upon my study of this industry that the existing freight rate structure is partly, at least, accountable for the fact that the manufacture of brushes from fiber has been in Official Classification Territory and that the manufacture of brushes in Florida near the sources of raw materials is of such relatively insignificant proportions. It is my opinion that if an equitable and uniform basis of rates, mile for mile, were established, the manufacture in Florida of brushes from Florida palmetto fiber could be expanded far beyond the present output. . . .[59]

An expert rate witness representing 95 per cent of the southern furniture manufacturers testified[60] that the present adjustment of rates on furniture within and from the South dates back to 1932 and represents various kinds of rates, all published as percentages of first class. Since the revisions of 1932, the rates on furniture within and from the South, with a few minor exceptions, have been made with direct rela-

[56] *Id.* at 2706-30.
[57] *Id.* at 2718.
[58] *Id.*, Exhibit 92, at 8442-3, 2654.
[59] *Id.* at 2719.
[60] *Id.* at 4815-33.

TABLE 10

FIBER BRUSHES, LESS-CARLOAD
(Rates stated in cents per 100 pounds)

To— (A) Chicago, Ill. (B) St. Louis, Mo. From—	Mileage	Rates Applicable (2d class)	Southern Basic Scale K-2 (2d class)	Official Territory Basis	Amount and Percentage Difference, Applicable Rate Over Official Territory Basis	
					Amount	Percentage
Jacksonville, Fla.....	(A) 1,061	224	220	162	62	38
	(B) 915	208	203	148	60	40
Otter Creek, Fla.....	(A) 1,087	241	223	164	77	47
	(B) 933	220	206	150	70	46
Benson Junction, Fla.....	(A) 1,173	251	232	171	80	47
	(B) 1,029	233	217	159	72	47
New York, N. Y.....	(A) 890	*142	...	145	..	..
	(B) 1,027	*157	...	159	..	..

* Import class rates.

tionship to the first-class rates, and therefore the first-class rates are the basis for determining the southern rates on furniture.[61]

In the Fall of 1932 the official lines published truck competitive rates on furniture by exceptions to the classification. The southern carriers then sought approval of official carriers in revising the rates from southern territory to a percentage of the applicable first-class rates which would approximate the level in official territory so as to equalize the reduced rates in the latter territory. The official carriers declined, in line with their announced policy, to equalize the rates, and countered with a suggestion, accepted reluctantly by the southern carriers, that resulted in rates higher than the existing commodity rates established by the southern carriers. Immediately there began an erosion of the furniture traffic from the South to official territory—from the rails to highway carriers.[62]

In 1940 the southern furniture manufacturers and carriers made vigorous renewed efforts to correct the discrimination, but were unsuccessful. As the result of the refusal of official-territory carriers to concur in the reduced rates from the South, the southern carriers lost seven or eight thousand cars of furniture per year. The witness concluded as follows:

> Because of that situation and because of the numerous efforts we have made from time to time to get the clearance of the Official lines in an equalized basis of rates, *we are convinced that it can be done only if required by this Commission, or if first class rates are prescribed on the same level in the two territories or between the two territories.*[63]

The following table was taken from Exhibit 92:[64]

[61] *Id.* at 4816.
[62] *Id.* at 4820-1.
[63] *Id.* at 4822. (Emphasis supplied.)
[64] *Id.* at 8448, 2654.

TABLE 11

CIGARS, ANY QUANTITY
(Rates stated in cents per 100 pounds)

To— (A) Chicago, Ill. (B) St. Louis, Mo. From—	Mileage	Rates Applicable (2d class)	Southern Basic Scale K-2 (2d class)	Official Territory Basis	Amount and Percentage Difference, Applicable Rate Over Official Territory Basis	
					Amount	Percentage
Jacksonville, Fla.....	(A) 1,061	224	220	162	62	38
	(B) 915	208	203	148	60	40
Tampa, Fla.....	(A) 1,226	256	240	178	78	44
	(B) 1,049	239	217	159	80	50
New York, N. Y.....	(A) 890	*142	...	145	..	..
	(B) 1,027	*157	...	159	..	..

* Import class rates.

The Tampa producer of cigars pays $2.39 per 100 pounds to move his product to St. Louis, a distance of 1,049 miles; a competitor located in New York pays $1.57 per 100 pounds to ship imported cigars to St. Louis, a distance of 1,027 miles.

Unsuccessful efforts to obtain reduced rates on matches in 1939 resulted in the abandonment and loss of a Jacksonville plant which had previously manufactured safety matches in cardboard strips for use as advertising matter, shipped in appreciable volume, both carloads and less-carloads. Exhibit 92[65] shows the fifth-class rates on matches, in carloads, from Jacksonville to important cities in official territory, and the percentages by which the rates exceeded the official class-rate basis. Reference, in particular, is made to the applicable rate of 118 cents from Jacksonville to Chicago as being 176 per cent of the official basis or fifth-class rate of 67 cents for equidistant hauls. "The high level of the class rates from Jacksonville into Central Territory was one of the primary causes of the discontinuance of the manufacture of safety matches in the Jacksonville plant."[66]

An executive of a large iron and steel company located at Pueblo, Colorado, testified[67] that his company's present eastern distribution radius is 700 miles, whereas to the North, West, and South, its steel products move from 1,000 to 1,600 miles to important markets; that the controlling factor in preventing a larger distribution to eastern markets is the prejudicial effect of the class rate structure,[68] which requires the payment of higher freight charges for the same distances than shipments from eastern origins. "The class rate structure is equally responsible whether the steel moves at the full fifth-class rate or at 32½ per cent of first class. As a matter of fact, the Colorado Fuel and Iron Corporation pays the full fifth-class rate from its mill at Pueblo, Colorado, on most of its shipments to an area in northwestern Oklahoma and Texas that is larger than the six New England States put together."[69]

[65] *Id.* at 8394, 2654.
[66] *Id.* at 2654.
[67] *Id.* at 2495-2506.
[68] *Id.* at 2498.
[69] *Id.* at 2499.

Pittsburgh can ship 50 per cent farther for the same charge than Pueblo, as illustrated by the applicable class 45 rate from Pittsburgh to Omaha, Nebraska, against the current class A rate from Pueblo, Colorado, to the same destination, on an actual movement of shell body forgings. The present rate from Pueblo to Omaha, for a haul of 601 miles, is $1.05, whereas from Pittsburgh to Omaha, involving a haul of 922 miles, the rate is only 99 cents, a double penalty in as much as the rate, mile for mile, is lower in the East than in the West, while at the same time the article is rated higher—40 per cent of first class in the East against 45 per cent (class A) in the West. As the western United States becomes industrialized it will ship new commodities, and it is unfair for a western-located industry to have to wait until the problem arises, only to discover that variations in classification impose extra and unexpected handicaps.[70]

Additional examples of class-rate disparities favoring official territory over southern territory are set forth in Exhibit 88.[71] The figures shown in the last column of the following table represent the percentage relationship of the actual rates under the southern class-rate scale to the actual rates under the official class-rate scale for any selected distance.

The Interstate Commerce Commission, in its report in the *Class Rate Investigation,* characterized the data presented as "abundant evidence"[72] of the higher

TABLE 12

Commodities (carloads, unless otherwise shown)	Classification Ratings Stated as Percentages of First Class			Southern Rate Level (Per Cent of Official)
	Southern	Official	South to Official	
1. Acid, sulphuric (in containers)	30	30	35	120
2. Acid, sulphuric (in tank cars)	27½	27½	35	110
3. Aluminum articles	75	75	75	138
4. Aluminum articles, LCL	100	100	100	138
5. Aluminum stearate, N.O.I.B.N.	40	40	35	160
6. Batteries, electric storage	40	40	40	138
7. Bottles, glass	35	35	35	138
8. Charcoal, wood	22½	27½	25	125
9. Cement, concrete, waterproofing compound	40	40	35	160
10. Drugs	45	45	50	122
11. Iron and steel articles, structural, LCL	40	40	50	114
12. Lead products, sheet	35	35	35	138
13. Lead products, pipe and fittings	40	40	35	160
14. Paint (other than earth) dry	40	40	35	160
15. Pottery	35	35	35	138
16. Starch	30	30	27½	150
17. Softener, cotton	37½	37½	35	150
18. Tanks, iron or steel: No. 2 Gauge	40	40	40	138
No. 3 Gauge	55	55	60	130
19. Wine	55	55	55	138
20. Yarn, rayon	45	45	55	115

[70] *Id.* at 2503.
[71] *Id.* at 8162-71, 2578.
[72] *Id.* at 123.

charges paid by shippers in the South and West using class rates. While no one can confidently forecast the decision of the Supreme Court, it is prognosticated here that the Court, like the Commission, will find the evidence ample and will uphold the Commission's decision, thereby removing the class-rate barrier to the economic development of the South and West.[78]

[78] This prediction was borne out by the Court's decision. See the FOREWORD to this symposium. [Ed.]

A RESEARCH BASIS FOR CORRECTIVE ACTION WITH RESPECT TO INTERTERRITORIAL FREIGHT RATES

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If the controversy over the effects of interterritorial freight-rate discrimination had stimulated as much effort to assemble needed data and to trace concretely the specific effects of rate disparities applicable to particular market situations as it has argumentative effort, it would be far easier to design and obtain corrective action. As indicated in another article in this symposium,[1] there is evidence, both factual and logical, that existing interterritorial rate disparities have a burdensome effect upon individual firms having to pay the higher rates, distance considered, and through them upon whole rate territories. Nevertheless, although some noteworthy beginnings have been made toward providing an adequate factual basis for judgment, it is clear that rate and other data necessary to examination of crucial questions, such as the extent of disparities in commodity rates and their effects, are not at hand.[2] It is the purpose of this note to outline some areas of statistics where additional progress is needed and to indicate some essential types of analyses that are lacking.

I

NATURE OF THE PROBLEM

Freight-rate discrimination has become a popular subject for discussion during the past two decades because of its allegedly retarding effect upon the location of industry, the development of industrial resources, and the utilization of labor power in several rate territories of the United States, particularly in the southern and south-

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This article represents the views of the author and not necessarily those of the United States Department of Commerce.

[1] See Barton, *Economic Effects of Discriminatory Rates, supra.*

[2] Thus, in its report on the Class Rate Investigation, 1939, the Interstate Commerce Commission stated (262 I.C.C. 447, 593 (1945)): "In many instances, commodity rates in the South are lower than commodity rates on like traffic in official territory. There is no comprehensive showing as to the general level of commodity rates in the South as compared with that in official territory."

western territories. The economic problem, then, is to define the specific influences that varying territorial rate levels may exert upon these factors and to find the magnitudes of those effects. The regulatory problem, on the other hand, is somewhat different, for whether or not the retarding and burdensome effects upon some industries or locations are of relatively large magnitude, any unjustifiable rate discrimination under the Interstate Commerce Act should be removed.

The types of effects that varying freight-rate levels may have upon producers, distributors, and other elements of the population located in different territories can be determined on the basis of assumption and logical analysis. For example, if we assume that producer *A*, located in official territory, and producer *B*, located in southern territory, have identical production and marketing costs for an identical product, but that in competing for sales in Chicago producer *A* enjoys a lower rate than producer *B* although they are equidistant from that market, it inescapably follows that producer *B* will have to absorb a part of the higher freight rate by accepting a lower profit margin. While absorption of freight-rate differentials would not necessarily mean that the producers assessed higher rates would be seriously handicapped (because of the possibility that they may have offsetting lower costs in connection with other production or marketing factors or enjoy lower rates on their other products), the presence of offsetting factors of this type cannot be assumed to exist in all cases. A number of possibilities are clearly indicated for each market situation affected by freight-rate disparities, depending upon the comparative capital, labor, marketing, materials, and management costs of the competing producers operating with varying freight costs and upon the existence or nonexistence of market preferences justifying higher prices for the product of the firm having to pay higher freight.

It is evident that many assumptions are required even to work out deductively the types of effects that freight-rate disparities may have upon a particular manufacturing or distributing firm located in the higher-rated territory. The task of defining such effects upon the manufacturing system or upon the distribution structure of the higher-rated territory as a whole is infinitely more complex, for, except to the extent that all firms in a particular territory may be subject to the same cost and market factors, a large variety of assumptions would have to be made to cover the many different situations that would be found to exist. Even when sufficient cases to be representative of the over-all territorial interest had been considered, the far more important problem of measuring the magnitudes of the effects that freight-rate disparities may be having upon locational and production trends in a particular territory would remain for solution. Although essential as a first step in working out the types of effects that might be expected from unequal freight costs, deductive reasoning by itself is inadequate for the task of determining the over-all significance of territorial differences in freight rates.

The assessment of magnitudes of effect upon individual firms, industries, or rate territories from freight-rate disparities requires an inductive approach upon an abun-

dance of facts covering a wide range of industrial situations and a large number of factors with respect to each industrial and marketing situation. In addition to the rate and mileage data essential to definition of the problem, specific facts would have to be assembled with respect to the following factors, among others:

1. The degree of homogeneity of the competing products produced in the different rate territories;

2. The extent to which market preferences for one or the other territory's product have been created by advertising or other marketing methods;

3. The extent to which the products of different territories are marketed in the same markets;

4. The prices received at wholesale in common markets for equivalent commodities produced by firms located in different rate territories;

5. The net receipts at the plant or mill in connection with sales of equivalent commodities produced in different territories but marketed in the same markets;

6. The costs sustained in producing equivalent products in different territories which are marketed in the same markets, including appraisal of the method of allocating joint and overhead costs;

7. The profit margins at the plant or mill in connection with production of equivalent products in different territories marketed in common markets.

Obviously, such intimate data are possessed, if at all, only by the competing firms located in the different territories, and their publication, if they were obtainable, would raise questions of disclosure of facts pertaining to individual business situations.[3] Some fragmentary information of this sort appears in testimony and decisions in connection with rate cases dealing with complaints of discrimination, but it is difficult to assemble and is too incomplete for over-all analysis. For these reasons, examination of economic effects in terms of entire territories usually proceeds by reference to trends in population, income, value added by manufacturing, the value of industrial products, and the number of industrial jobs, rather than by delineation of the specific effects of rate disparities upon individual firms. Thus, comment is often not very selective, for comparative industrial trends in different territories reflect a variety of factors in addition to freight-rate differences.[4] When coupled with analysis of the significance of each factor of production, such as the availability of key materials at low cost or of an economical labor supply, economic trend analysis may come closer to revealing the importance of freight rates. To make this approach really effective, however, case studies of individual industries are needed. Only in such studies can the freight-rate factor be analyzed thoroughly in con-

[3] The OPA files of profit and loss statements and balance sheets collected for administration of price control during World War II might contain useful data. These statements exhibit detailed cost breakdowns for the period 1936-39 and one or more wartime years. Unit costs and profits from manufacturing in a particular locality are included in some cases. It is uncertain at this stage, however, whether the data will be permanently filed, and if so, whether they could be made available for general use.

[4] BOARD OF INVESTIGATION AND RESEARCH, REPORT ON INTERTERRITORIAL FREIGHT RATES, H. R. Doc. No. 303, 78th Cong., 1st Sess. 223 (1943).

junction with the other locational factors exerting an influence upon the production and marketing situation of the higher-rated territories.

It is apparent that concrete discussion of economic effects from freight-rate disparities requires reference to all factors in the industrial situation, whether the analysis is focused upon the individual firm, an industry, or the entire industrial economy of a rate territory. Many series of data, in addition to transportation series, are therefore essential; but the greatest handicap experienced by those who attempt measurement of economic effects consists of the lack of adequate rate and traffic data for determining the extent of freight-rate differences by territorial, industrial, and commodity breakdowns, rather than the defects in our manufacturing and marketing series.

The lack of extensive rate and specific movement data may seem surprising in view of the well-known fact that freight tariffs and classifications must be filed with the regulatory body and be kept open to public inspection under the requirements of the Interstate Commerce Act. Notwithstanding this fact, one of the greatest barriers to constructive thinking and effective analysis of the economic significance of territorial freight-rate discrimination has been the lack of adequate specific rate, mileage, and traffic movement data to enable the parties to reach agreement upon the facts with respect to the extent of rate-level differences, the starting point for any examination of the subject on an over-all basis. Because of this deficiency in available data, it is extremely difficult to define the areas in the rate structure or the specific areas of traffic of an industry or territory which are affected by freight-rate differences sufficiently marked to have significance. The rate structure is so complex and facts about it are so hidden in technical tariffs and rate decisions that discussion and argument concerning economic effects frequently proceed without the benefit of prior definition of the precise commodity or mileage areas where freight-rate differences exist and of definite knowledge of the magnitude of rate differences or of the characteristics of the traffic movements affected by such rate differences as may exist. Under the circumstances, it is no wonder that public opinion is often confused and tends either to be unexcited or easily induced to accept stereotyped slogans of a political nature.

Since definition of the specific problems of discrimination that may be present in existing territorial rate structures is an obvious first step in analysis of the economic significance of freight-rate disparities, it is of interest to describe the particular types of transportation data which are needed for that purpose and to indicate the gaps that exist in the available data. Then, the means by which greater progress can be made toward supplying at least the most urgent data for settlement of current issues can be considered with profit.

II

Transportation Data Needs and Gaps

Among the most crucial of the relevant transportation series that are now generally unavailable are: (1) data showing for each territory and interterritorially the

proportion of total carload and less-carload traffic that moves on class, exception, and commodity rates, including sub-classifications such as export, import, joint, and transit rates; (2) statistics showing point-to-point rate relationships on a representative sample basis for the entire railroad rate structure of the United States, intrastate, intraterritorially, and interterritorially; (3) data showing point-to-point shortline mileage relationships on a comparable sample basis; and (4) data showing on a comparable point-to-point sample basis the volume of traffic in each commodity that is transported on different types of rates and rate levels. It would be helpful to have similar data for other forms of transport, particularly truck and water transport, but the need is greatest for more adequate data on the rail rate structure and traffic pattern. These sets of transport data would not answer all questions, but at least they would have the merit of enabling the analyst to define in a specific manner the discriminatory situations which should receive attention.

Traffic Movement by Types of Freight Rates

Historically, the present interterritorial freight-rate discrimination problem arose primarily in connection with class rates. But because of the intimate relation between class rates and other types of rates, principally exception rates and commodity rates, and the fact that the bulk of the rail traffic moves upon the latter, the issues have inevitably spread to include exception and commodity rates as well. In fact, the issues of greatest economic significance to each rate territory and the country as a whole revolve around the commodity rates, on which the largest part of the traffic is transported. Obviously, therefore, knowledge concerning the proportion of traffic in each territory and between each set of rate territories that moves on each type of railroad rate is essential to straight thinking on effects of rate disparities.

As a result of a one-day waybill sample of 1942 carload traffic and other statistics available to the Interstate Commerce Commission, the proportions of carload railroad traffic that are carried on each general type of rate in each territory and between each set of territories are known with sufficient exactitude for assessing the over-all significance of territorial class-rate discrimination.[5] However, since determination of economic effects of freight-rate differences requires analysis in terms of particular industries, particular commodities and products, particular markets and particular market conditions, it is also essential that data be available to reveal the proportions of the traffic of individual industries that are transported on class, exception, and commodity rates. Because no point-to-point tabulation of domestic railroad traffic as a whole has ever been completed on a sufficiently representative sample to indicate the types of rates on which the traffic in particular commodities is moved between each important set of origination and termination points in each freight-rate territory and as between rate territories, readily available data showing the types of rates which are important to particular industries and to particular commodities are not at hand.[6]

[5] Class Rate Investigation, 1939, 262 I.C.C. 447, 479 (1945).

[6] The Bureau of Transport Economics and Statistics of the Interstate Commerce Commission has programmed a series of traffic-flow and rate-structure analyses based in part upon the 12-day waybill

Thus, although it can be concluded that the considerable differences in territorial and interterritorial class-rate levels that are not justifiable by cost differences do not affect 85 per cent or more of the total railroad traffic, comprehensive analysis of the specific effects which these rate-level differences may have upon the particular industries which do make material use of class rates is blocked at the beginning by inadequate information. One must necessarily resort to illustrative case materials available in rate proceedings or undertake to assemble primary data from the industries affected by class-rate inequalities.

When the *Class Rate Investigation* decision[7] was handed down by the Commission on May 15, 1945, the writer received requests from several trade associations to prepare analyses of the special significance to the industries represented in those associations of the interim and long-run adjustments ordered by the Commission. In discussions with representatives of the associations and with commodity experts and industrial analysts it was quickly discovered that little or no information was available regarding the extent to which the traffic of the trade association membership moved on the class rates which were to be adjusted when the order of the Commission became effective. Nor was such data described in the Commission's report, although the summary of evidence by shippers on the effect of class-rate disparities for certain commodities provides fragmentary data on the commodity movements affected by class rates.[8] Hence it was not feasible to prepare the type of analysis for these groups that would have been desirable.[9] This lack of data on movement by types of rates, of course, did not prevent those groups and others from discussing the probable effects of the decision, but it did render much of that discussion futile and lent a quality of vagueness that should have been unnecessary.

Point-to-Point Rate Relations

Point-to-point rate data for all individual commodities of significance to our industrial and agricultural economies are needed to reveal the characteristics of the entire rail rate structure, the most fundamental one in terms of domestic freight traffic and geographic agricultural and industrial relationships. For each point-of-origin to each point-of-destination movement of an individual commodity, it would be desirable to have the first-class rate that would be applicable if no lower rate were quoted, the actual rate, and the characteristics of that rate—whether an exception or commodity rate, export or import rate, local, proportional, or joint rate, and whether

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sample of 1939 carload traffic taken by the Board of Investigation and Research, of which The Transportation of Fresh Apples, Statement No. 468, File No. 40-C-2, March, 1946, is the first. Among the data on fresh apple traffic presented from this source is "the percentage of traffic moving under class, exception, and commodity rates, respectively." See pp. 47-48 for a breakdown of revenues, tons, ton-miles, carloads, and car-miles by type of rate in each rate territory and pp. 64-68 for a similar breakdown of interterritorial movements of fresh apples.

[7] 262 I.C.C. 447 (1945).

[8] *Id.* at 615-619.

[9] The general analysis that resulted on the basis of available data was published under the title, *Effect of New Rail Rates on Business*, 33 Domestic Commerce, No. 8, 21-22, 44-45 (1945).

the rate includes special services such as transit and reconsignment privileges. To be practical these data would have to be collected on a representative sample basis, but the sample would not have to be taken frequently, because adjustments could easily be made for general and special rate changes once the point-to-point rate pattern had been published.

Point-to-point rate statistics would shortly become as fundamental a tool for transportation factor analyses as population data have been for demographic studies. Such data would facilitate locating areas where rate differences may exist by states, territories, and combinations of territories. They would also greatly contribute to measurement of the extent of such rate disparities on individual commodities as may be found to exist between particular sets of points and to determination of differences in average rate levels for groups of commodities or territorial breakdowns. Except for a limited number of basic commodities moving on commodity rates, only data showing class-rate level differences have been available. Obviously, if freight-rate differences do not exist in connection with other types of rates, or those found to exist with respect to the rates on which the traffic actually moves are so insignificant as to be trifling, further study of probable economic effects, with extensive analysis of industrial trends, cost factors, and market relationships, would have little point. Of course, it may be presumed that since so much agitation has arisen there must be thousands, if not millions, of cases where freight-rate differences do exist. Many have been exposed in the course of rate proceedings and other investigations. Thus, measurement of these differences in connection with particular sets of origination and termination points or territorial rate levels would be an invaluable aid to making progress in ascertaining the economic significance of varying territorial and interterritorial rate levels. Since undue discrimination in freight rates is banned under the Interstate Commerce Act, the information on loads, actual and shortline mileages, extent of circuitous transportation, and other factors that might be collected at the same time would be useful in determining the specific costs of service as tests, among others, of the reasonableness of the rate differences found to exist.

Although point-to-point rate data would prove a material aid to constructive analysis of interterritorial freight-rate issues, it should be recognized that waybill sources for such statistics would show rate relations only with respect to traffic that actually has moved between specific points. Discriminations in rates that are so serious as to shut off the flow of traffic in particular commodities between points where production might occur and consuming markets would obviously not show up in data based on a sample of past traffic. Other sources, such as tariffs and classifications, would have to be relied upon for assembling the "paper" rates which have been so high as to discourage production and traffic flows completely.

It may be granted that small or minor differences in freight-rate levels as between particular sets of origination and destination points or territories may be disregarded as constituting insignificant barriers to industrial development and utilization of resources, and that it would not be a mark of economic wisdom to equalize all freight

rates on a rigid distance-cost basis. On the other hand, freight-rate differences that are material cannot reasonably be passed over either by the regulatory body having the duty of eliminating discrimination not justified by differences in transportation conditions or by the analyst concerned with the economic significance of freight-rate disparities. With existing sources, however, there is no way, except by tedious and expensive examination of a great many tariffs and rate decisions, by which the analyst can discover whether differences in many freight rates may exist and whether they are sufficient to have significance. That procedure usually requires considerable technical knowledge and staff resources in order to dig the data for any large study from the tariffs and classifications. Sometimes scanning a great many rate decisions of the Commission in a search for rate chronologies and histories will be productive of useful data, although the series obtained in this manner will frequently be incomplete and not up to date. In addition, data found in rate proceedings refer generally only to particular commodity movements between specific sets of points rather than to the entire rate structure of a commodity or territory. Thus, as tools for describing freight-rate differences in the entire rate structure, these methods have deficiencies which defeat most attempts, even the most ambitious and persevering ones, to assemble the pertinent data.

One of the defects of most published comment on effects of territorial and inter-territorial freight-rate disparities is that the freight-rate differences considered have been shown by reference to sets of points between which the traffic movements for which the rates have been compared are often noncompeting. That is to say, rates are selected for movements of the same commodity from different producing points to different markets. That device has been used because of the difficulty of obtaining adequate data for comparison of rates between alternative production locations and common markets where the shortline distances are comparable and also because the traffic pattern is not known with sufficient definiteness to make location of sets of points involving actual competition between movements easy. This method, of course, suffers from the serious defect of referring to market situations which may have little or no effect upon each other and to rate disparities that consequently cannot influence the opportunities and profits of the producers at different locations. Adequate point-to-point rate data, coupled with shortline mileages and traffic flow information, would greatly facilitate selection of sets of points involving common markets except in cases involving origin points from which no movement has occurred. In the latter situations, analysis would be benefited by having the sets of points between which movements do occur identified, together with the applicable rates and other essential information for comparative purposes.

Point-to-point Mileage Relations

In addition to the needs outlined above for point-to-point rate data, it is equally necessary that data be made available showing the point-to-point distances between the same sets of points for which specific rate information is needed. Of critical

importance are the shortline distances—the mileages by the shortest practicable rail route between origination and termination points. The shortline distance is the "yardstick" mileage for comparing rates in terms of the transportation with which they are associated. Although shortline distance alone does not reflect all "transportation conditions" that must be considered by the regulatory body in judging whether rate differences involve unjust discrimination, it is a most significant measure of the transportation service rendered and is widely relied upon in rate proceedings.

The other distance measure, the actual number of miles over which the shipment moved, has its usefulness, too, particularly in studies of the extent and economic significance of circuitous mileage and cross-hauling. However, since neither shippers nor the railroads themselves are prohibited from selecting routes that are circuitous in order to control participation in the traffic, actual route miles cannot be utilized as a reliable "yardstick" in rate comparisons. The shortline distances between producing points *A* and *B* and the consuming point *C* might be identical, but the shipment from *A* over a circuitous route might be 20 per cent greater than if it had moved in the shortest route. Obviously, a rate from *A* to *C* 20 per cent higher than from *B* to *C*, between which the shipment had moved over the shortest practicable route, would not be justified although in accordance with the mileage relations determined by the actual routes used.

The problem of obtaining shortline distances by reference to tariffs, mileage books, and maps is even more baffling and time-consuming than the effort to obtain rate data from tariffs and classifications. To select the shortline route by these procedures usually requires a rate and tariff expert, for there appears to be available no directory publishing the shortest practicable rail routes for freight traffic between all sets of points and the distances associated with such routes. To work out the shortest route and distance may take a tariff expert up to a day or more in some of the more difficult instances. Although some shortline routes and distances between specific points can be found in the reported rate decisions of the Commission, that source itself has the limitations of being far from complete and involving considerable effort because the data in the decisions and transcripts are not indexed.

Point-to-Point Traffic Movements

Most available tonnage data providing commodity breakdowns refer to a limited number of commodity groups, each, with some exceptions, incorporating many individual commodities. Except for limited port-to-port water movement data, none of these series provides state-to-state or point-to-point breakdowns either of aggregate traffic or traffic in each commodity classification. Between 1922 and 1940 data on intercoastal water traffic were published annually by the United States Maritime Commission and predecessor agencies on a port-to-port basis for a limited number of general commodity classifications.[10] Beginning in 1940 the ICC's freight com-

[10] RESEARCH DIVISION, U. S. MARITIME COMMISSION and predecessors, ANN. REPS. No. 317 (1922-1940). The Maritime Commission is resuming publication of this series, after a lapse during the war

modity statistics for rail carriers have shown tonnages originated and terminated by states, but they have never shown state-to-state movements.[11] For knowledge of the traffic significance of particular sets of points, the analyst must utilize a variety of statistical devices and refer to numerous sources, including reported rate decisions, traffic movement studies, and industrial studies having reference to production and consumption centers and traffic movements.

Where marked rate differences exist for comparable shortline mileages, it is of interest to know the volume of movement that has taken place despite these rate differences. If the volume has been considerable from the higher-rated point or territory and has registered growth, the question would arise whether the rate differentials had affected the higher-rated producers in any significant manner. Of course, as noted above, the producers may have elected to accept a lower profit margin or they may have had lower costs in connection with other factors in production or marketing. If, on the other hand, the movement from the point or territory with the higher rates had not grown as rapidly as the movement from the point or territory with the lower rates, the situation would point to a burdensome effect. In either case, if the rate disparities could not be justified by cost differences or other dissimilar transportation conditions, the higher-rated producers would be entitled to relief from unlawful discrimination irrespective of the effect of the rate differences upon the flow of traffic.

It is recognized that relative traffic movements between points would not throw light upon the effects of rate differences in cases where production might exist at a point but has never developed because freight rates on raw materials or finished products, or both, have been too high to make location there attractive. In such situations an effective freight rate from the points at which new plant locations are being considered to the contemplated markets would have to be established to replace the "paper" rates, presumably class rates, that are too high to serve as a practical basis for attracting industry. The rate and distance relations between the points from which movement does occur to the markets for the commodities under consideration, however, would reveal the extent to which existing class rates are impractical and would afford a basis for rate negotiations with a view to providing rates which would effectively stimulate industry. In other cases, some movement, but only a small volume, occurs from certain points where production has been established despite higher freight rates than those applicable from competing points. In these cases the problem is to determine what rate will stimulate growth in production

period, with reports covering the calendar year 1946, under an arrangement by which the Office of the Board of Engineers, War Department, has become the collecting and tabulating agency. For the first six months of 1946 the commodity classification will be the same as in the prewar reports; for the last six months the commodity breakdown will be in accordance with the old I.C.C. freight commodity statistics classification. Beginning with 1948, the data will be classified in accordance with the revised I.C.C. commodity classification, effective January 1, 1947, thereby assuring a much needed uniformity in commodity detail between intercoastal water and rail traffic statistics.

[11] Statements numbered M-550 (SCS), now on a quarterly and calendar-year basis. Beginning January 1, 1947, these statements will be designated Q-250 (SCS), reflecting the new and refined commodity classification.

and utilization of resources at such disadvantaged points and still yield the carriers adequate revenues. Ability to find other producing points from which traffic movements to the projected markets have occurred and to discover the freight-rate and mileage relationships between all such points and common markets, on the one hand, and the rates from the points where production is limited, on the other hand, would be an indispensable aid in discovering whether the transportation factor is responsible for retarded development.

Point-to-point traffic flows of individual commodities by type of rate, such as are needed for studies of the significance of freight-rate differences, and state-to-state traffic movements, such as would be useful in industrial location work by revealing interregional economic relations, could be assembled from waybills concurrently with data showing point-to-point rate and mileage relations on an individual commodity basis. The sampling method would give adequate results, and samples would not have to be taken frequently since basic traffic patterns, like industrial and marketing patterns, usually are subject to only gradual change.[12]

Cost of Transportation Service

Transportation cost-finding constitutes another area in which the available data have generally been inadequate for the variety of transportation analyses for which cost data are essential, including the question whether existing differences in territorial and interterritorial rate levels are justifiable under the Interstate Commerce Act. The needs that exist for more refined cost data have heretofore been neglected in this discussion not because the subject lacks importance but because relatively more progress has been made in cost-finding for regulatory purposes than in development of specific rate, mileage, and traffic flow data.[13]

Without having attained perfection in cost-finding, the Interstate Commerce Commission was able to conclude in its *Class Rate Investigation* decision that "there is no doubt that, based upon cost of service considerations, the differences in levels, schemes, and progressions of scales that at present occur in the several territorial class-rate structures here under review are not justified."[14] Thus, although this finding was not unanimous, with respect to one fundamental part of the rate structure there appears strong evidence that a problem of discrimination not justified by cost differences exists, and the regulatory body is proceeding with corrective action. But the argument goes on as vigorously as ever whether the class-rate-level disparities are significant to the economic welfare of the rate territories principally concerned, because of lack of data of the types described above and of refined analyses of the

[12] See BUREAU OF TRANSPORT ECONOMICS AND STATISTICS OF THE INTERSTATE COMMERCE COMMISSION, REGIONAL SHIFTS IN THE POSTWAR TRAFFIC OF CLASS I RAILWAYS, Statement No. 4622, File 314-B-6, September, 1946, Vol. I, p. 6.

[13] For an excellent discussion of the usefulness and problems of cost-finding, see the statement by Dr. Ford K. Edwards, *Cost Analysis in Transportation,* read before the American Economic Association, Atlantic City, New Jersey, January 25, 1947 (37 AM. ECON. REV. PROC. 441 (1947)). See also 262 I.C.C. 447, 571-591, 692-927 (1945).

[14] 262 I.C.C. 447, 694 (1945). See Commissioner Porter's criticism of the majority's cost-finding in his dissenting opinion, *id* at 717-719, and H. R. Doc. No. 303, 78th Cong., 1st Sess. 251-285 (1943).

economic significance of class-rate-level differences with respect to particular industries and enterprises.

For the purpose of checking the specific justification that might or might not exist in transportation conditions for material differences in particular rates, existing cost data and procedures are less adequate. Here, too, the age-old problem of whether and to what extent it is tenable to base individual rates on specific costs of service, with necessarily arbitrary allocations of overhead and joint costs, has to be faced, together with questions regarding the particular measures or levels of costs that may appropriately be referred to in testing the justification for rate differences. Notwithstanding this complexity, and without subscribing to a cost basis for particular rates, it may be observed that more adequate cost measures, like shortline distance data, would be a helpful aid in determining whether differences in particular sets of rates found to exist are justifiable. Irrespective of whether such differences have a marked influence upon economic development in territories with the higher rates, if they run foul of legal standards of rate control action should be taken to remove them.

III

Development of More Adequate Transportation Data

From this description of gaps in available transport statistics needed for evaluation of freight-rate discrimination and for a variety of other purposes, it is apparent that an urgent requirement for constructive action is that more adequate commodity-movement, rate, and mileage data be obtained. The possibilities of developing additional data of those types may now be sketched briefly.

With respect to the initial problem of ascertaining where freight-rate differences exist in the rate structure and their magnitude, it may be observed that available data and studies appear adequate for general agreement on the facts in regard to differences in territorial and interterritorial class-rate levels.[15] The problem of unknowns arises rather in connection with exception rates, which are responsible for about 11 per cent of aggregate carload traffic, and commodity rates, on which approximately 85 per cent of the nation's carload traffic moves.[16] Additional data showing the point-to-point rates and shortline mileages for these segments of the rate structure are urgently needed. As already indicated, point-to-point traffic flow data associated with specific rate and mileage data are needed for all types of traffic to reveal the importance of each type of rate to particular industries, to locate significant traffic movements, and to throw light upon the effect of rates upon traffic and industrial development.[17]

[15] Class Rate Investigation, 1939, 262 I.C.C. 447, 566-569, 744-765 (1945); and H. R. Doc. No. 303, cited *supra*, note 14, at 20-21, 55-56, 90-91, 150, and 165-175.

[16] 262 I.C.C. 447, 548-550, 564, 570-571, 593-600, 601-604 (1945); H. R. Doc. No. 303, cited *supra*, note 14, at 92-148, 185-221; and Transportation Program for Small Business, Report of the Transportation Subcommittee to the Senate Special Committee to Study Problems of American Small Business, Pursuant to S. Res. 28, 79th Cong., 2d Sess. 16-17 (1946).

[17] Transportation Program for Small Business, cited *supra*, note 16, at 25-27, 31-32.

BIR Waybill Sample of 1939 Railroad Traffic

Fortunately, a source already has been developed which could provide much of the needed information with respect to rates, mileages, and specific traffic movements for the benchmark year, 1939. In connection with its studies of relative economy and fitness of carriers by highway, railroad, and water and its study of the interterritorial freight-rate problem, the Board of Investigation and Research, a temporary research agency established by the Transportation Act of 1940, took a twelve-day waybill sample of 1939 rail carload traffic which, if tabulated on a point-to-point basis for individual commodities, would afford a comprehensive picture of the rate structure and an excellent basis for measurement of freight-rate differences applying to traffic actually moved in that year.[18]

A brief description of the characteristics of the BIR waybill sample and the specific types of data which are obtainable from or in conjunction with that source will facilitate consideration of steps that might be taken toward making essential data available. The sample totals 690,000 copies of waybills or waybill abstracts representing the movement of more than 900,000 carloads of 1939 traffic, or all waybills of carload traffic terminated by class I railroads during one day each month of that year. Different days of the month were assigned to the railroads in each region to obtain traffic representative of seasonal movements. The tonnage reported amounted to 3.9 per cent of the total 1939 carload tonnage reported by all class I railroads to the Interstate Commerce Commission. Although the sample is more representative of aggregate carload traffic and of traffic by commodity groups than it is of movements of individual commodities between particular origins and destinations or states, the question of representativeness is not of such critical importance when the data are used for the purpose of determining point-to-point rate and mileage relations as it is when they are used for other purposes.[19]

Each of the copies of waybills or waybill abstracts which were prepared by the terminating railroads shows the following details:

Date of waybill
Originating railroad, station, state, and rate territory
Terminating railroad, station, state, and rate territory
Route of movement, including junctions and carriers on interline traffic
Commodity name and ICC group number

[18] For a complete description of this waybill sample, see *Excerpts from the Board's Reports Concerning Its Carload Traffic Study, 1939*, a mimeographed release of the BIR, now available in the Interstate Commerce Commission, to which agency the study files of the BIR were transferred after the latter agency ceased operations on September 18, 1944. Some of the preliminary statistical results of this survey are shown in the Board's study, THE NATIONAL TRAFFIC PATTERN, S. Doc. No. 83, 79th Cong., 1st Sess. 28-56 (1945).

[19] For observations on the representativeness of the BIR waybill sample, see BOARD OF INVESTIGATION AND RESEARCH, PRELIMINARY REPORT ON THE RELATIVE ECONOMY AND FITNESS OF THE CARRIERS, H. R. Doc. No. 595, 78th Cong., 2d. Sess. 15 (1944); *Excerpts from the Board's Reports Concerning Its Carload Traffic Study, 1939*, cited *supra*, note 18; THE NATIONAL TRAFFIC PATTERN, cited *supra*, note 18, at 9-11; and REGIONAL SHIFTS IN THE POSTWAR TRAFFIC OF CLASS I RAILWAYS, cited *supra*, note 12, Vol. I, 138, Vol. II, 299-300.

Weight of the shipment
Rate assessed
Freight charges, including advances but excluding charges for miscellaneous services
Where applicable, whether joint shipment (if joint rail-water or rail-highway), reconsigned (if reconsigned enroute), and transited (if under transit privilege)
Route mileage over which the car moved origin to destination
Date terminated
Number of carloads.

It will be noted that the waybill abstracts assembled by the BIR do not reveal the type of rate on which each shipment moved, the first-class rate, nor the shortline mileage—all essential items for effective analysis of the significance of freight-rate differences. In order to associate specific commodity movements with class, exception, or commodity rates and with shortline or rate-making distances, it is necessary to obtain these items from classifications, tariffs, and mileage books and to insert them on the copies of waybills or waybill abstracts prior to tabulation on a point-to-point basis. In practice, these operations can be conducted when the rates and charges shown upon the waybills or waybill abstracts are being verified, but they involve extremely time-consuming procedures which make tabulation on a point-to-point basis an expensive procedure.[20]

Before its statutory life ended the BIR made a number of compilations on the basis of the twelve-day waybill sample data, including a tabulation showing for each of 156 carload commodity groups the movements originating in each state by state of termination and those terminating in each state by state of origin.[21] These state-to-state movements, although not broken down by individual commodities, are of greater value for general analyses of interregional trade and economic relationships and for locating possible industrial opportunities than they are for tracing the economic effects from freight-rate disparities. As already indicated, point-to-point breakdowns showing rate, mileage, and traffic relations for individual commodities are necessary for the latter purpose.

The BIR undertook special studies of lime, potatoes, and paperboard products for which it assembled the first-class rate, type of rate, and shortline distance data and tabulated these and the other waybill data on a point-to-point basis by a hand-tabulating procedure that proved to be an efficient method of obtaining a list of point-to-point shipments arranged by ascending shortline distances by type of rate and territorial movement.[22] For each point-to-point shipment arrayed in this manner the following data were provided:

[20] Bureau of Transport Economics and Statistics, Interstate Commerce Commission, The Transportation of Fresh Apples, Statement No. 468, File No. 40-C-2, 1-4.

[21] These compilations and studies based upon them are described in *id.* at 2-3. On page 3 it is stated: "These compilations are available in unpublished form in the files of the House Committee on Interstate and Foreign Commerce, the Senate Committee on Interstate Commerce, and the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission."

[22] Some of the results of these exploratory studies were not published, but the data obtained on circuity of movement and cross-hauling appear in The National Traffic Pattern, S. Doc. No. 83, 79th Cong., 1st Sess. 47-57 (1945).

The serial number of the waybill
Originating railroad, station and state
Terminating railroad, station and state
Actual and shortline miles
The first-class rate and the percentage relation of the effective rate to the first-class rate
By type of rate on which the shipment moved, the number of cars, the weight of the shipment, the actual rate, and the charges assessed
Information as to whether the rate was a joint rate or involved reconsignment or transit privileges.

The completion of point-to-point tabulations such as were started by the BIR would have provided a detailed view of the railroad rate structure and rate differences that is now not available. In addition to revealing a variety of rate disparities in terms of the shortline mileage standard between territories, within territories, and even within single states, these trial tabulations have demonstrated the feasibility of using waybill samples to obtain specific rate and commodity-movement data of the type that has long been needed for a variety of transportation and industrial research purposes, including evaluation of interterritorial rate disparities. As a result, the interest of a number of Government agencies and many state and private research groups, including individual business firms, in continuing sample waybill studies has been awakened, and the Interstate Commerce Commission, the public repository of the BIR files, is making a limited number of point-to-point tabulations on the basis of the twelve-day 1939 sample, and has inaugurated a continuous sample of carload traffic approximating one per cent of total carload traffic.[23] Although the adequacy of that sample for various purposes will have to be explored by analysis of the results, and no announcements have been made to indicate the specific data breakdowns which the Commission will ultimately release, it is apparent that much of the data needed for further and more refined analysis of the economic significance of interterritorial freight rates could be obtained from this additional waybill source.

It is therefore clear that progress is being made toward filling in some of the gaps in available statistical equipment for specific analyses of the significance of freight rates and other transportation factors to location of industry and development of markets. It should be observed, however, that new and continuing waybill samples do not obviate the need for completion of the BIR sample of 1939 carload traffic, because that year is a basic benchmark year previous to the vast industrial changes of the World War II period. While there have been both general rate advances and changes in traffic since 1939, adjustments can easily be made for changes in rates, and it is usually well known where industrialization has occurred that would sharply affect a territorial breakdown of traffic. Another reason is that specific

[23] See the Commission's order of September 6, 1946. Effective November 1, 1946, and thereafter unless ordered otherwise, Class I railroads are directed "to file an authentic copy of the front only of the audited waybills for all carload shipments terminated, whose waybill serial numbers are '1' or end with '01.'" The sampling procedure takes a straight one per cent sample of the larger stations having more than 100 waybills per month, based on the numbering system utilized by the stations themselves. The smaller stations are classified in accordance with the expected number of waybills for the month and sampled on the basis of probabilities within the classification.

point-to-point data are needed immediately and data can be obtained from the BIR waybill sample more quickly than from other sources.[24]

Census Procedures

An important development toward obtaining more adequate transportation data in relation to industry is the interest currently being shown in bills to authorize the Bureau of the Census to include questions on transportation, exclusive of railroads and other modes where existing data may be adequate, in the censuses of manufactures, mineral industries, and other businesses, to be taken every five years, beginning in 1948. If legislation of this kind is enacted and if questions are included in the manufacturing and other schedules to ascertain the tonnage into and out of individual plants and business locations by mode of transport and the payments for transportation service, data will become available which will enable analysts to determine the significance of each mode of transportation to individual industries and the importance of transportation cost as a production and marketing factor.[25] Railroad freight-rate differences that are sufficient to be burdensome would have that effect only to the extent that the traffic of a firm or an industry could not be diverted to a more economical agency. Data showing the division of traffic in particular industrial situations, such as could be obtained by census procedures, would throw much light upon the extent to which producers in territories having higher railroad rates have been able to shift to other forms of transportation.

Case Studies of Significance of Transportation Factors

Adequate transportation data alone will not suffice to isolate the economic effects of territorial freight-rate differences. As indicated above, when sufficient specific rate, mileage, and commodity-movement data are at hand to locate areas where significant freight-rate differences may exist, knowledge of the problems requiring study and attention will become more definite. A basis will then be available for further examination of the particular situations in which the effects of freight-rate differences might be considerable. To discover whether they are, however, will require detailed studies of all of the production and marketing factors influencing the profit opportunities of particular firms and industries in the higher-rated territories as compared with those in the lower-rated territories. These case studies should be historical in approach so as to reveal the long-term significance of each locational factor in the

[24] The I.C.C.'s Bureau of Transport Economics and Statistics is in the process of making point-to-point tabulations from the BIR sample, showing for each commodity group (sometimes for each product in the group) the origin city and state, the destination city and state, the month in 1939 of the shipment, the actual and shortline miles, the first-class rate, the actual rate per cwt., the weight of the shipment, and the total freight charges, for three groups of commodities comprising 37 agricultural and industrial commodity classes and 83,361 carloads. Two such tabulations, covering Commodity No. 550, common brick, and Commodity No. 110, oranges and grapefruit, have been completed and made available to interested government agencies. It is understood, however, that the data from such tabulations can be released to the public only in such manner as not to reveal the traffic of individual firms.

[25] The Senate Civil Service Committee on April 24, 1947, reported favorably on S. 554, which would authorize the Bureau of the Census to take transportation censuses along with censuses of manufactures and other businesses. Sen. Rep. No. 141, 80th Cong., 1st Sess. (1947). On May 6, the Senate passed this bill. 93 Cong. Rec. 4692-4693 (1947).

past development of each territory as a preliminary to evaluation of future possibilities. The possession of point-to-point rate and shortline mileage relations, together with relative traffic volumes, would contribute markedly to appraisal of the influence of transportation factors upon future development.

Meanwhile, the issues with respect to interterritorial freight rates must be settled on the basis of the best judgment possible in view of existing gaps in necessary information. Since resolving these issues will undoubtedly require a long time, there will be ample opportunity for research groups and students to make more specific analyses of the effects of freight-rate disparities than have been available in the past. The progress that is being made toward obtaining more adequate transportation data, although slow, offers encouragement to those who would attempt the much-needed case studies of industrial location.

CORRECTIVE ACTION BY THE INTERSTATE COMMERCE COMMISSION

EDWARD H. MILLER*

I

INTRODUCTION

Now pending before the Supreme Court of the United States[1] is the question whether the Interstate Commerce Commission exceeded its authority in ordering a 10 per cent decrease in railway class freight rates for all interstate shipments throughout the United States east of the Rocky Mountains, except for shipments within the northeastern area of the United States, and in ordering a 10 per cent increase in railway class freight rates for all interstate shipments within the northeastern area of the United States. The Commission's action was described as an interim measure pending the bringing about of national uniformity in the classification of freight and a greater degree of national uniformity throughout the United States in the class freight rate structures, and was based on findings that these changes were necessary in order to eliminate unreasonableness and undue discrimination in classifications and freight rates, in violation of sections 1 and 3 of the Interstate Commerce Act.[2]

The order of the Interstate Commerce Commission now challenged in the Supreme Court was entered on May 15, 1945, contemporaneously with the filing of an elaborate 160,000-word report or opinion of the Commission explaining and supporting the order.[3]

The Commission's decision is generally regarded as its most important and far-reaching action in sixty years, and it is no exaggeration to say that it affects virtually every person in the United States. Although the class rates involved are only a seg-

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[1] October Term, 1946, The States of New York, Delaware, *et al.*, Appellants, v. The United States of America, *et al.*, Appellees, No. 343; The Honorable Horace A. Hildreth, Governor of the State of Maine, *et al.*, Appellants, v. The United States of America, *et al.*, Appellees, No. 344; The Atchison, T. & S. F. Ry., *et al.*, Appellants, v. The United States of America, *et al.*, Appellees, No. 345; appeals from the United States District Court for the Northern District of New York, argued March 3, 4, 5, 1947.

[This paper was prepared before the cases here cited were decided by the Supreme Court. See New York v. United States, 67 Sup. Ct. 1207 (1947), and the FOREWORD to this symposium. Ed.]

[2] 24 STAT. 379 (1887), as amended, 49 U. S. C. §1 (1940); 24 STAT. 380 (1887), as amended, 49 U. S. C. §3 (1940).

[3] Class Rate Investigation, 1939, 262 I.C.C. 447 (1945); Supplementary report and order denying motions to reconsider and reopen, Class Rate Investigation, 1939, 264 I.C.C. 41 (1945).

ment of all the going railroad[4] freight rates, they set the pattern for the whole freight rate structure; they move a substantial amount of the high-quality, high-revenue railroad freight; and without classification and class-rate uniformity there is no possibility of achieving uniformity for any other freight rates.

The Commission's decision in 1945 resulted from two separate investigations, instituted on its own motion on July 29, 1939: Docket No. 28310, entitled *Consolidated Freight Classification,* and Docket No. 28300, entitled *Class Rate Investigation, 1939.* All the railroads in the United States subject to rate regulation were made respondents, and a panel of state commissioners sat with the Commission throughout the proceedings.[5]

The Commission held extensive public hearings in various cities. A record of over seventeen thousand pages was built up. Almost five hundred lawyers and other persons appearing in a representative capacity were participants of record in the proceedings. Pre-hearing conferences started in 1940, hearings were held during 1941, 1942, and 1943, the case was submitted on extensive oral arguments and numerous briefs in 1944, and was held under advisement by the Commission for almost a year.

On November 29, 1945, nine northern states filed their petition in the District Court for the Northern District of New York to set aside in their entirety the findings and action of the Commission. The governors of the six New England states intervened on the side of the plaintiffs, as did most of the western railroads, which later brought a separate suit in the same court seeking the same relief, this suit being consolidated with the original suit. The Interstate Commerce Commission intervened on the side of the United States, as did the southern states and a number of the western states. An interlocutory injunction was issued by the three-judge court on December 21, 1945; the case was tried on its merits in February, 1946; and on May 9, 1946, the three-judge court filed a unanimous written opinion adopting all the Commission's findings of fact and upholding the action of the Commission in all respects.[6] In the final decree, however, entered May 27, 1946, the District Court stayed the effect of the Commission's order pending decision by the Supreme Court of the United States, so that the new rates are still inoperative.[7]

II

STATUTORY AUTHORITY OF THE COMMISSION

A. Before 1940

The two investigations instituted by the Commission were inquiries into two kinds of unlawfulness—unreasonableness and discrimination. The unlawfulness

[4] Interstate rail-and-water and all-water rates and classifications were also involved in the investigation orders, but were later eliminated from consideration.

[5] 24 STAT. 383 (1887), as amended, 49 U. S. C. §13(3) (1940).

[6] State of New York v. United States, 65 F. Supp. 856 (1946).

[7] The Government and the other appellees tried unsuccessfully in the Supreme Court, by a separate appeal, allowed by Mr. Justice Reed on May 31, 1946, to have this stay pending appeal vacated by the Supreme Court, on the authority of such cases as Virginian Ry. v. United States, 272 U. S. 658 (1926), and United States v. Ohio, 291 U. S. 644 (1934). United States v. New York, 328 U. S. 824 (1946).

which was the subject of the inquiry concerned classifications and also class rates, each from the standpoint both of unreasonableness and discrimination.

Section 1(5)(a) is the major substantive section of the Interstate Commerce Act dealing with unreasonableness of rates. It provides that "all charges made for any service rendered . . . shall be just and reasonable," and it prohibits "every unjust and unreasonable charge."[8] Section 1(6)[9] embodies the same obligations and prohibitions, with respect to classifications, as are imposed by section 1(5)(a) in connection with rates. Section 1(4) extends these provisions to joint through rates and classifications.[10]

Section 3(1) of the Act deals with discrimination. It mentions neither rates nor classifications, but its language is so broad that it obviously includes both. It prohibits "any undue or unreasonable preference or advantage . . . or . . . undue or unreasonable prejudice or disadvantage in any respect whatsoever" to persons, places, or kinds of traffic.[11] The sweeping character of this prohibition against discrimination—the principal evil aimed at by the original Interstate Commerce Act—has been emphasized by the Supreme Court many times.[12]

Section 15(1) of the Act gives the Commission the power to fix new rates to supplant unlawful rates.[13] This section provides that upon a finding by the Commission that classifications or rates, or both, are unlawful under section 1 or section 3, or both sections, "the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable rates, . . . maximum or minimum, or maximum and minimum, . . . and classification," and it prohibits noncompliance with the new rates and classifications so prescribed. When the Commission prescribes rates under section 15(1), it is, of course, acting in a legislative capacity.[14]

The broad power of the Commission before 1940 is indicated by *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad,* in which the Court said:

> Under §15 of the statute the Commission of its own motion may conduct a comprehensive inquiry into the rates of all lines within the area of controversy, may fix the fair relation between one line and another, and may build the structure of the rates accordingly. *Florida v. United States,* 292 U. S. 1; *United States v. Louisiana,* 290 U. S. 70.[15]

B. The Transportation Act of 1940

In 1940 Congress gave the Commission a clear mandate to deal with interterritorial rate discrimination when it amended section 3(1) of the Interstate Commerce Act so as to prohibit specifically any undue or unreasonable preference or advantage to any "region, district, or territory";[16] and by section 5(b), known as the Ramspeck

[8] 24 STAT. 379 (1887), as amended, 49 U. S. C. §1(5)(a) (1940).
[9] 24 STAT. 379 (1887), as amended, 49 U. S. C. §1(6) (1940).
[10] 24 STAT. 379 (1887), as amended, 49 U. S. C. §1(4) (1940).
[11] 24 STAT. 380 (1887), as amended, 49 U. S. C. A. §3(1) (Supp. 1946).
[12] See Louisville & N. R.R. v. United States, 282 U. S. 740 (1931).
[13] 24 STAT. 384 (1887), as amended, 49 U. S. C. §15(1) (1940).
[14] Terminal R. Ass'n v. United States, 266 U. S. 17 (1924).
[15] 294 U. S. 499, 509 (1935).
[16] 24 STAT. 380 (1887), as amended, 49 U. S. C. §3(1) (1940).

Resolution, Congress directed the Commission to institute an investigation of the interterritorial and intraterritorial rates and to remove any unlawful discrimination found to exist between territories.[17]

Until 1935 section 3(1) specified only "person, company, firm, corporation, association, locality, or particular description of traffic" as objects of prohibited discrimination. The only word in that series that refers to a geographical unit is "locality." The word "locality" was held not broad enough to include a port district in *Texas & Pacific Railway Company v. United States*,[18] and therefore in 1935 Congress added to this series the following items: "port, port district, gateway, transit point."

These words, especially after the *Texas & Pacific* case, seemed not broad enough to cover territories as a whole, a designation which, of course, by 1940 was well recognized as a term of art in the railroad regulation field. The legislative history of the 1940 amendment of section 3(1), which added to the series "region, district, or territory," shows quite clearly that Congress was aware of the limited application of the earlier language and sought to remove this limitation.[19]

The appellants' principal argument in the District Court and in the Supreme Court in the *Class Rate* case has been that the Commission made a mistake of law in treating the 1940 legislation as a Congressional mandate requiring the Commission to bring about absolute national uniformity in freight rates. The contention is that the Commission is repeating the mistake it made twenty years ago in interpreting the Hoch-Smith Resolution[20] as a mandate to treat agricultural products as a most favored class, regardless of existing standards of rate making—an erroneous conception which the Supreme Court repudiated in upsetting the Commission's decision.[21] The fallacy in this argument is that the Commission did not treat the 1940 legislation as a mandate to bring about national rate uniformity regardless of differences in territorial conditions, but only as a mandate to investigate territorial conditions, and to eliminate territorial rate differences to the extent that they were found to be unjustified by differences in territorial conditions. Whether the 1940 amendment to section 3(1) made a change in substantive law by prohibiting discrimination against territories which was not unlawful before, as the lower court held, or whether the 1940 amendment was merely declaratory, there can be no question about the power of the Commission in 1945 to remove territorial discriminations found to exist. The Commission understood this, and undertook only to remove discriminations which it found to exist. The very point of its whole proceeding was to find out whether existing rate differentials were or were not justified by differences in territorial conditions.

Section 3(1) of the Interstate Commerce Act has always been an unequivocal, although qualified, mandate for rate uniformity. The very thing Congress sought

[17] 24 STAT. 380 (1887), as amended, 49 U. S. C., note following §3 (1940).
[18] 289 U. S. 627 (1933).
[19] 84 CONG. REC. 5889, 9705 (1939).
[20] 43 STAT. 801 (1925).
[21] Ann Arbor R.R. v. United States, 281 U. S. 658 (1930).

to achieve by section 3(1), starting in 1887, was equality of rates. Railroads were required by the original section 3(1) to charge equal rates to all persons, and were prohibited from charging them different rates in the absence (and of course, this is the necessary qualification) of different circumstances requiring that they be given different treatment. If two persons under equal circumstances were shipping the same kind of freight from one point to another, they had to be treated equally. Of course, if the freight were of a different kind, or if the mileage or points of origin or destination were different, these or other differences might warrant a rate differentiation; but in the absence of substantial differences of circumstances, the essential mandate of section 3(1) will control.

Whereas section 3(1) in its inception had been a mandate to the Commission to equalize rates as between persons, it became, in 1940, a mandate to equalize rates between regions and territories, subject to the same inherent qualification—a mandate to bring about equality of rates, not *regardless* of surrounding circumstances, but *unless* surrounding circumstances require rate differentiations. Before the investigation in the *Class Rate* case there had never been any effort by the Commission to inquire into the question whether the admitted large differences in class rates between territories were or were not justified or required by comparable territorial differences in costs and other transportation conditions. Neither the Commission nor the Congress, nor anyone else, knew to what extent, if any, these rate differentials were required or justified by different conditions in the several rate territories. However, it was generally believed, as the debates in Congress show, that it would probably be found that at least some of the differences were not justified, or were not justified to the extent of the rate differences.[22] It was this situation which the Commission recognized as requiring it to bring about "a greater degree" of equalization and uniformity.[23]

III

THE RATE SITUATION FOUND BY THE COMMISSION TO EXIST IN 1945

The existing system of making railroad freight rates has been discussed in detail in other articles in this publication. However, the rate-making situation as the Commission analyzed it in the *Class Rate* case is so closely related to the relief which the Commission decided to order that an explanation of the phases of the rate structures emphasized by the Commission in its report seems appropriate and necessary here.

A. Classifications

The first section of the Commission's report is given over to an analysis of the existing classifications. The Commission considered classification to be the foundation or cornerstone of rate making, because rate relationships have no meaning unless they are tied to stable and properly related classification ratings. The class-rate scales

[22] 84 CONG. REC. 5889-5890, 6071-6072, 9705 (1939); 86 CONG. REC. 5553 (1940).

[23] 262 I.C.C. 447, 692 (1945). The Commission's report will be searched in vain for any indication that it considered itself required, as appellants insist it considered itself required, to bring about national rate uniformity regardless of territorial differences in transportation conditions.

are entirely in terms of class 1 or first-class ratings. Since all other classification ratings are in terms of percentages of the first-class rates, the actual cost of shipment is just as much affected by the classification rating assigned to a commodity as it is by the level of the first-class rate scale. The Commission's report shows why the Commission instituted not only a class-rate investigation but also a classification investigation, and immediately consolidated the two: because, as a practical matter, class rates cannot be dealt with apart from classifications. As the Commission stated, "A rating must be complemented by a class rate, and vice versa, in order to give substance to either."[24]

In the early days of railroads, classification of freight was patterned after that used for transportation by boats and wagons and did not follow any definite standards, each road having its own practice. Usually, only a small variety of traffic moved on any one short railroad, which might use only a few simple classes, such as light goods, heavy goods, case goods, logs, and whiskey—a far cry from the modern freight classification containing over 20,000 ratings.

As railroads developed and grew, classification systems became more complex, but not much more unified. For example, at one time in the Middle Atlantic states and West Virginia alone (eastern trunk-line territory) there were 138 different freight classification systems. With increasing interchange of traffic between railroads, a number of different classifications were in effect on a single railroad: one for local traffic, another for joint traffic in one direction, another for joint traffic in the opposite direction, and others applying to traffic moving to or from particular sections of the country. Such complexity was, naturally, a source of great confusion and uncertainty to shippers.[25] The need for a more nearly uniform classification was acute when the Interstate Commerce Act of 1887 came into being and required that all classifications be reasonable and nondiscriminatory.

Just before the Interstate Commerce Act became effective, the carriers in official territory,[26] faced with classification systems within their territory at least as chaotic and complicated as the Commission was faced with in 1939 in the nation as a whole, cleaned up and unified the official-territory classification by only eleven days' work, consolidating all the many classification systems in that territory into one new one, which became effective with the Act on April 1, 1887.[27]

Since Congress and the Interstate Commerce Commission were and are dealing with a national economy rather than a regional economy, it was naturally to be expected that under the direction of the Commission national classification uniformity would quickly follow the enactment of the Interstate Commerce Act in 1887, especially after the experience of the eastern carriers in their quick cleaning up of the classifications in their territory. However, although the Commission has constantly

[24] 262 I.C.C. 447, 473 (1945).
[25] Suspension of Western Classification, 25 I.C.C. 442 (1912).
[26] Roughly, the area of the United States north of the Potomac and Ohio rivers, and east of the Mississippi River.
[27] 2 I.C.C. ANN. REP. 36-37 (1888).

emphasized the necessity of national classification uniformity, the differences between the classifications of the East, South, and West are almost as fundamental and varied as they were in 1887, and the Commission had never undertaken to tackle the problem of national classification uniformity until 1939.

The Commission, prior to 1939, had brought about classification uniformity within the separate regions, step by step, but had not tried to deal with the problem of the relationship between regions. These region-by-region adjustments, which, like the national investigation, dealt with both classifications and class rates in the same proceedings, were accomplished during the 1920's and early 1930's.[28]

In the *Consolidated Southwestern Cases* the Commission made this rather plaintive progress report:

> For years we have endeavored to promote uniformity in classification. Except for unification of rules and commodity descriptions, the progress in that direction has not been encouraging. . . . So long as vital differences in classification exist it is impossible to bring about uniform class percentages throughout the country, but, on the other hand, until the class percentages are made more nearly uniform, progress toward uniform classification is impeded.[29]

In 1939 there were three major classifications, just as there had been in 1887. The differences between them, and their relationship to each other, are illustrated in the following table (which also includes the separate Illinois classification, a further complication):

TABLE I[30]

Percent of Class 100	Regular Class Designation				
				Western	
	Official	Illinois	Southern	Western Trunk-Line and Southwestern Territories	Mountain-Pacific Territory
100	1	1	1	1	1
85	2	2	2	2	2
70	3	3	3	3	3
60	...	...	...	...	4
55	R-26	R-26	4	4	...
50	4	4	...	...	5,A
45	...	...	5	A	...
40	...	A	6	...	B
37½	...	...	...	5	...
35	5	5	7	...	...
32½	...	B	...	B	...
30	...	...	8	C	C
27½	6	6,C	...	...	...
25	...	...	9	...	D
22½	...	D	10	D	...
20	...	E	11	...	E
17½	...	...	12	E	...

[28] Southern Class Rate Investigation, 100 I.C.C. 513 (1925); Consolidated Southwestern Cases, 123 I.C.C. 203 (1927); Western Trunk-Line Class Rates, 164 I.C.C. 1 (1930); Eastern Class Rate Investigation, 164 I.C.C. 314 (1930).

[29] 123 I.C.C. 203, 398 (1927).

[30] 262 I.C.C. 447, 467 (1945).

In 1942, as of August 3, there were 20,916 sets of ratings in effect. Approximately one-third of the carload ratings were uniform in the three classifications, but all the rest of the carload ratings represented differences between territories, and almost one-fourth of all the carload ratings were unlike in any two of the classifications.

The ratings are subject to numerous other substantial variations, inconsistencies, and disparities. The great bulk of the items are concentrated in a comparatively few classes, and some classes contain no items at all, or only one, two, or three items. The range of the variations is wide. For example, in carload ratings, on items rated class 35 in official territory, the ratings in southern and western territories range from class 17½ to 55; on items rated class 40 in southern, the ratings in official range from class 27½ to 70, and in western, from class 17½ to 40; and on items rated class 45 in western, the ratings in official range from class 27½ to 85, and in southern, from class 30 to 55.

There is no consistency in the assignment of ratings on the same article as between less-than-carload lots and carloads. On a given item, one classification will provide the same rating for less-carloads as for carloads, but in other classifications the ratings for carloads will be lower (or perhaps higher) than for less-carloads. Although less-carload and carload ratings are the same on many items, on the great majority of them the former are higher than the latter and extremely wide spreads often occur, with less-carload ratings ranging up to 471 per cent of carload ratings. Frequently these differences show up much more in the rates than in the ratings, because even when the ratings are the same in all three territories the rates are subject to the differing rate levels.

Of course, the real problem which results from different territorial classifications lies in the making of interterritorial rates, where different classification ratings compound the difficulty caused by different rate levels. Not only are the rate levels different and the articles assigned to different classes; the classes frequently have different identification symbols, or the same identification symbol represents classes having different percentage relationships to first class or to other classes. Sometimes a direct route goes through all three classification territories. Thus, different rates exist in opposite directions between the same points, and over the same routes, on classes that do not bear like percentage relations to the corresponding first-class rates between the territories concerned. There is no way, except through classification and class-rate uniformity, to relieve this situation, because an attempt to do it by changing the classification of a particular article for the purpose of an interterritorial movement distorts the rates as the distance in one of the territories increases and the distance in the other territory, which has a different rate level, decreases.[81]

The Commission concluded that there was no reason, of any validity, for the sixty-year delay in bringing about classification uniformity. The Commission concluded that necessary specific adjustments in rates could always be made by adjusting rate levels or by making exceptions to the classification, and that there was never

[81] State of Alabama v. New York Central R.R., 235 I.C.C. 255 (1939), 237 I.C.C. 515 (1940).

any necessity for having different classification ratings for the same article. The Commission pointed out that if the same classification rating can apply in a single area including regions as dissimilar as Maine and southern Illinois in official territory, or Florida and Kentucky in southern territory, there is no reason why the same classification cannot apply throughout the United States. The Commission gave the railroads the opportunity to take the initiative in preparing a new uniform classification, and they have indicated that they will do so, although unfortunately no time limit was set. This commitment of the railroads does not, of course, make classifications less important in the case now before the Supreme Court. The classification findings of the Commission are still important, both because of the interdependence of classifications and class rates and because the classification findings as well as the class-rate findings are embodied in the Commission's single report, which is under attack in its entirety and which seems indivisible.

B. Class-Rate Structures

As explained above, neither the classification alone nor the class rate alone determines the cost of shipment, and classification uniformity within territories has gone hand in hand with class-rate uniformity within territories in the Commission's regional proceedings. The territorial class-rate structures are at least as far out of line with one another as the territorial classifications.

The railroad freight-rate structure of the United States has developed on a localized basis like a patchwork quilt, with each locality or railroad starting with a different level and scheme of rates. The localities and railroads have grown and merged into fewer levels and schemes, until the present territorial boundaries were finally reached. But the crossing of these boundaries to achieve national uniformity had to wait until 1947; before the *Class Rate Investigation* was started in 1939 the Commission had made no attempt to harmonize or relate the regional rate structures.

There are, of course, five rate territories, compared with three classification territories, and these five rate territories are further divided into various zones and subterritories with different schemes of rates. In the *Eastern Class Rate Investigation* the Commission noted that rates in the three traditional subdivisions of official territory "have grown up independently of each other and, for the most part, with little common resemblance," with some of their class rates "difficult to describe because they are not based upon any definite principle."[32]

In the South, the class-rate structure prior to 1928 was a hodgepodge of rates built around the old basing-point system, and the Commission in describing the rate structure of southern territory prior to the southern revision said that "great inconsistencies prevail."[33] The rates in the West had likewise evolved piecemeal and had been the subject of complaints by every state regulatory commission in the territory.[34]

The Commission in the regional proceedings did set up uniform scales of class

[32] 164 I.C.C. at 323, 332 (1930).
[33] Southern Class Rate Investigation, 100 I.C.C. at 532 (1925).
[34] Western Trunk Line Class Rates, 164 I.C.C. 1, 26-36 (1930).

rates for each region, but provided special different treatment for the sub-regions and for particular situations. Key-point rates were provided to supplant class rates in parts of each territory, but the key-point rate systems of the territories, like the class-rate systems, were not consistent or similarly extensive within the separate territories. In the border areas between territories efforts were made, through special rate adjustments, to soften the sharp breaks at the borders between the territorial rate levels.[35] In the West, four separate zones were set up, with an elaborate laminated formula for adding zone differentials layer on layer in making rates between zones.[36]

The interterritorial class rates (as distinguished from the intraterritorial class rates described above) were far more complicated, even after the regional revisions, and are still unsuitable to move traffic in a national flow. It is only necessary to study the K-2-Q-1 rate scheme applicable between southern territory and the western part of official territory,[37] or the complexities of the interterritorial rate adjustment covering the border area on both sides of the boundary between official and southern territories,[38] to discover how unnecessarily complex and difficult the interterritorial rate situation has been made by the fact that each territory has its separate classification and class-rate structure. If any further persuasion is necessary, it is suggested that the complications caused by the Mississippi River boundary between the West and the other territories be examined.[39]

IV

THE FINDINGS AND CONCLUSIONS OF THE COMMISSION

The proceedings before the Commission in the *Class Rate* case were characterized by the usual informality, in comparison with a court of law, as far as rules of evidence and latitude in method and scope of presentation are concerned. As a result, a substantial part of the record is made up of statements by various shipping and other interests of their positions and views, which were not in all cases supported by detailed or relevant factual data. However, the 17,000-page record does have detailed factual evidence covering almost every kind of rate situation, and the Commission itself caused to be prepared and received in evidence elaborate technical studies, perhaps the most important of which were the cost, traffic, and economic studies. The original report of the Commission is over 160,000 words long, and is highly technical and rather discursive. However, the major findings and conclusions can be reduced to six main propositions, which will be analyzed separately below. Whether these six major findings were supported by adequate evidence and preliminary findings is the most important issue in the case before the Supreme Court. In

[35] See, for example, North Carolina Corporation Comm'n v. Akron, C. & Y. Ry., 213 I.C.C. 259 (1935).

[36] Western Trunk Line Class Rates, 164 I.C.C. 1 (1930), 204 I.C.C. 595 (1934).

[37] Southern Class Rate Investigation, 100 I.C.C. 513, 532 (1925).

[38] North Carolina Corporation Comm'n v. Akron, C. & Y. Ry., 213 I.C.C. 259 (1935); Commonwealth of Kentucky v. Ahnapee & W. Ry., 213 I.C.C. 297 (1935).

[39] Western Trunk Line Class Rates, 164 I.C.C. 1 (1930); Western-Southern Class Rates, 226 I.C.C. 497 (1938); Consolidated Southwestern Cases, 21st Supplemental Report, 205 I.C.C. 601 (1934).

a sense it is the only real issue in connection with the 1940 legislation, because, as noted above, the difference between the parties is really not whether Congress gave the Commission a mandate to equalize rates regardless of territorial transportation conditions, but is rather whether, or the extent to which, territorial transportation conditions are sufficiently different to warrant the existing territorial rate differentials.

1. *Class rates within southern and western territories, and from these territories to official territory, are much higher, article for article, than the rates within official territory.*

The Commission first considered the territorial rate *levels* as distinguished from specific situations involving competitive rate inequalities. It concluded that the first-class rate scale for southern territory was 37.7 per cent higher than the official territory first-class rate scale, and that the three rate territories in the West had first-class rate scales higher than the official scale by 46, 61, and 71 per cent, respectively. These are the figures for *intraterritorial* movements.

Because *interterritorial* movements can be figured only in terms of specific places (the actual rate depending upon how much of the movement is in each territory), abstract comparisons of interterritorial rate levels with intraterritorial rate levels cannot be made. The Commission found that a Nashville shipper would pay 39 cents more on each hundred pounds of first-class freight moving to Indianapolis, Indiana, than a shipper to Indianapolis from Kent, Ohio (the distance being practically the same)—a disadvantage of 41 per cent. Thousands of such examples were offered in evidence.

Comparisons such as this are, of course, theoretical, and based on the published rate scales and tariffs, without regard to actual shipments. Having considered these discriminatory rate levels, the Commission went on to consider the testimony of shippers who were discriminated against, and to hear about their actual experiences of competitive disadvantages caused by the discriminatory rates, of which the following incidents are illustrative:

Atlanta, Georgia, is a large producer of machinery-wiping rags, which were in heavy demand in official territory in carload lots during the war, but the Atlanta shipper competing in official territory with official-territory shippers was obliged to pay rates 80 per cent higher than the official-territory level. The Atlanta producers were consistently unsuccessful in bidding for business in official territory, solely because of this freight-rate discrimination.

An extreme case was that of a manufacturer of automobile truck bodies at Nashville, Tennessee, who labored under a rate handicap as high as 253 per cent of the rates available to his competitor at Detroit, Michigan, when both manufacturers were shipping to Metuchen, New Jersey, which is 965 miles from Nashville and 616 miles from Detroit. The Nashville shipper was paying $2.10 per hundred pounds, and the Detroit shipper from 53 cents to $1.03.

A large iron and steel company in Pueblo, Colorado, was able to reach eastward only as far as 700 miles, compared with its distribution in all other directions of

1,000 to 1,600 miles. The controlling factor in preventing more extensive distribution in the East was the class-rate structure, which permitted Pittsburgh to ship 50 per cent farther for the same charge than Pueblo. For example, Pueblo was paying $1.05 to ship steel shell castings 601 miles to Omaha, Nebraska, whereas Pittsburgh was shipping to Omaha, 922 miles away, for only 99 cents.

2. *Higher class rates have impeded the development and movement of class-rate traffic within southern and western territories, and from these territories to official territory, and thus have made all the class-rate structures obsolete.*

a. *Impeding the development of class-rate traffic—economic data.* The Commission, having found class rates higher in the South and West, and having found that these discriminations were injuring individual shippers, properly considered that in investigating territorial discrimination, it should inquire further into economic disadvantages of the South and West on a territorial basis, because territorial discrimination would seem to mean something broader than discrimination against individual shippers located in a territory. If the territorial rate levels in the South and West were substantially higher than the official-territory level, and if the industrial development of the South and West had been retarded, so that these regions were at substantial economic disadvantages, it was a legitimate inference that there existed at least some cause and effect relationship between these two facts. Elaborate economic data were introduced in evidence by the Commission's experts and by others, on the basis both of logic and precedent.[40]

The evidence showed that in 1939 official territory produced 67.8 per cent of all the manufactured products in the United States, by value, and 71.4 per cent of the total value added by manufacture. The average dollar income per person employed in 1940 in official territory was $1,988, compared with $940 in southern territory and $1,177 in southwestern territory.

The South and West furnish raw materials to official territory, which adds intensively to their values by making finished products, which it then ships back to the South and West. This dominant mercantile position is achieved largely through the imposition of larger rate discriminations on manufactured goods than on raw materials. For example, on cottonseed oil the rate from southern to official territory is only 7 per cent higher than the official-territory rate, but the rate on cottonseed oil manufactured into oleomargarine is 35 per cent higher. A striking illustration of the way in which the rates have discouraged manufacturing in the South and West is afforded by the fact that the average ton of outbound freight from official territory represents value added by manufacture of $54.69, which is about thirteen times as great as the $4.19 value added by manufacture to the average ton outbound from the South and West.

The South and West are largely dependent on official territory for new manufacturing industries, because a substantial portion of the purchasing power of the United States is in official territory, which has approximately half of the population of the

[40] Texas & P. Ry. v. Interstate Commerce Commission, 162 U. S. 197, at 219 (1896).

United States, 64 per cent of the national market for all goods and services, and 76 per cent of the market for industrial machinery and raw materials.

The Commission concluded that piecemeal adjustment of class rates could never adequately meet the problem of the lack of development of class-rate traffic from the South and West, because individual adjustments do not and cannot take into account traffic which does not already exist. The Commission concluded that class rates presently discriminate against the southern and western industries that use and pay them; they also discriminate against the industries in existence which would use them if they were not so high; but they go even farther, and discriminate against industries that are still unborn and that cannot be born until fair class rates precede them into existence.

b. *Non-use or obsolescence of class rates.* The Commission found that the class rates have, by reason of nonuse, become obsolete, and that they "do not now serve the purposes for which they were designed."[41]

In the *Southern Class Rate Investigation* the Commission said:

> The new class rates should look also to the future. They should, for example, be so framed as to facilitate the elimination not only of special classification exceptions but also of many commodity rates which provoke complaints of discrimination and have no other excuse than an inadequate and imperfect class-rate structure.[42]

A waybill study was introduced in evidence showing on a sample basis how much carload traffic moved on class rates in 1942. It showed that in official territory 5.8 per cent of the carload traffic moved on class rates, but that only 1.8 per cent of such traffic moved on class rates within southern territory, 2.4 per cent within southwestern territory, and 0.6 per cent in western trunk-line territory. All the rest of the traffic in these territories moved on exception or commodity rates. The evidence showed wholesale removals of commodities from the classifications, over three thousand commodities having been removed from the southern classification at one time in September, 1940.

The class rates are the pattern and heart of any rate structure. The Commission concluded that if the class rates in the South and West were so high that exception rates and commodity rates could, in the short space of time since the regional class-rate revisions, supersede them almost completely, there was something fundamentally wrong with these class-rate structures. When class rates become obsolete, the hodgepodge that emerges, made up almost entirely of *ad hoc* rate adjustments, cannot accurately be called a coherent rate structure. The conversion by the carriers of class rates into paper rates, after the extensive labors of the Commission in setting up the regional class-rate structures, proves that the regional class rates have become obsolete, largely by virtue of their maladjustment, region by region, with each other. The Commission concluded that this excessive use of *ad hoc* rates had broken down the soundness of the rate structures, and made the class rates so obsolescent or obso-

[41] Class Rate Investigation, 1939, 262 I.C.C. 699 (1945).
[42] 100 I.C.C. 513, 603 (1925). See also Consolidated Southwestern Cases, 123 I.C.C. 203, 234 (1927).

lete that they required revision, because they would not and could not move the traffic which they were designed to move, and because each rate structure had almost completely broken away from what was intended to be its pattern and cornerstone.

3. *Comparative costs of transportation service do not justify the existing class-rate differentials.*

The most important factor in comparing territorial transportation conditions is cost of service, because practically all other factors, such as density of traffic, terminal operations, terrain, etc., are merged in the cost figures. The Commission relied heavily on the cost study introduced in evidence by one of its experts, Dr. Ford K. Edwards, which has been called the most comprehensive study of transportation costs ever made. Space limitations prevent any detailed explanation of this cost evidence, but the procedure followed was to relate every expense of every railroad in each territory to the particular units of service with which each item of expense was found to be directly variable (such as gross ton-miles, car miles, car days, etc.), and then, knowing the number of each unit furnished in each territory, to construct cost scales for every possible significant variation of equipment, loading, etc. From the cost scales it was then possible to determine costs in each territory of representative identical loads and hauls, and of actual loads, hauls, and traffic consists. Almost every possible kind of territorial comparison was made, using both direct or variable costs and fully distributed costs, including allowances for return, with the result that the Commission concluded that no substantial difference could be found to exist between the territories in transportation costs, costs in the South being slightly *below* those in official territory, and costs in the West being, in general, slightly higher. The Commission therefore found that existing territorial rate differentials are not justified by territorial cost differentials. Rates of return in the South and West were found by the Commission to be more favorable than in official territory, and this was stated to be an additional reason for the conclusion that the rate differentials were not justified.

4. *Differing consists and volumes of traffic within the territories are no justification for the class-rate differentials.*

Although there is more class-rate traffic in official territory than in other territories, and although many commodities move in larger volume in one territory than in another, the Commission found that there were not sufficient differences in consists *for revenue purposes* to justify the class-rate differentials.

In the first place, all interterritorial traffic is common to two or more territories. In the second place, the high-paying traffic, embraced mainly in the Commission's grouping called "Manufactures and Miscellaneous," accounts for 27 to 29 per cent of the total tons carried in each of the three territories—a small spread. The corresponding revenue percentages differ by similarly small margins. The three remaining principal groups of products, which can broadly be characterized as traffic moving at relatively low rates and in substantial volume, likewise have a narrow spread as between territories, of under 4 per cent at the extremes, in both total tons carried

and revenues, so that when considered by groups the consists of the territories do not differ very much.

On the question whether there should be rate differences because a particular commodity moves in great volume in one territory and in small volume or not at all in another territory, the answer is that territorial volume means nothing to the individual shipper, and nothing to the carrier except from the standpoint of costs, which, territory by territory, were found not to differ substantially. The real question is not whether the commodities moving in the several territories are different, but whether they have different rate-bearing characteristics. The fact that some particular commodity moves regularly in substantial quantity in one territory—like phosphate rock in the South, which moves only in small quantities in the other territories—means nothing if comparisons of total revenues and rates of return show that other commodities must be moving in the other territories with equal revenue-producing effects.

5. *Equalizing the class rates of the territories is not dependent on equalizing other rates.*

Appellants in the *Class Rate* case claimed that the exception and commodity rates in the South and West were lower for the same freight than the official territory rates, and that the Commission could not properly raise class rates in official territory and lower them in other territories without, at the same time, bringing about some kind of equalization of exception and commodity rates, which move the great bulk of the traffic in all territories. The Commission's answer to this point was twofold: There was no proof that the territorial commodity and exception rate levels in the South and West were lower; and, second, the Commission could not revise every rate in the United States in one proceeding, and had a right to proceed step by step, with the class rates, which are the pattern for all rates, as the necessary and logical first step. Of a similar situation, where the Commission had undertaken, step by step, to correct a type of discrimination found illegal, the Supreme Court had said, in *United States v. Wabash Railroad Company:*

> . . . The suppression of abuses resulting from violations of §6(7) would be rendered practically impossible if the Commission were required to suppress all simultaneously or none. Section 12(1) imposes on the Commission the duty to enforce the provisions of the Act. That duty under §6(7) would hardly be performed if the Commission were to decline to enforce it against one because it could not at the same time enforce it against all.[42]

6. *Interterritorial rate problems are insoluble without uniformity in class ratings and rates.*

On a physical basis, the railroads of the United States have developed into a national system. Carloads of freight loaded at any point can be delivered to any other point where standard-gauge railroads exist without unloading and reloading en route. However, the uniformity that characterizes this mechanical service does not extend to freight rates, the price of the service. Consequently, there exists a

[42] 321 U. S. 403, 414 (1944).

composite of regional rate structures that do not and cannot be made to fit together properly, because of pronounced differences in both the level and scheme of the rates. This regionalism restricts commerce and trade by hampering a national flow of traffic across these territorial boundary lines, thus retarding economic progress. As stated by the late Joseph B. Eastman, in his first report to Congress as Federal Coordinator of Transportation:

> . . . An objectionable phase of the railroad situation for many years has been the maintenance of regional differences and distinctions, which are very imperfectly related to differences in costs and of territorial boundary lines ("Chinese walls") where rate systems and practices change. It has tended to provincialize the railroads and discourage national unity of action. It has been a prolific source of complaints to the Commission.[44]

The malignant effects of territorial rate discriminations were noted by the Supreme Court in *Georgia v. The Pennsylvania Railroad Company:*

> . . . Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets.[45]

V

THE ATTACK ON THE COMMISSION'S DECISION

A. Procedure

The Urgent Deficiencies Act of 1913[46] gives the district courts of the United States original jurisdiction of cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission. The venue of such suits is governed by section 43,[47] and procedure by sections 44-48,[48] which provide, among other things, that such suits shall be brought against the United States, with intervention by the Interstate Commerce Commission a matter of right. The jurisdiction of the District Court for the Northern District of New York in the *Class Rate* case rested on these provisions. The interlocutory injunction of the District Court was issued under section 47. After the court entered its final decree, the plaintiffs below took a direct appeal to the Supreme Court of the United States, as provided for in section 47a.

B. Scope of Review

The scope of review by a district court and by the Supreme Court of orders of the Interstate Commerce Commission, when such orders are attacked under the procedure used in the *Class Rate* case, is narrow and closely circumscribed under the Supreme Court's decisions.

[44] SEN. DOC. No. 119, 73d Cong., 2nd Sess. 29 (1934).
[45] 324 U. S. 439, 450 (1944).
[46] 38 STAT. 219 (1913), 28 U. S. C. §31 (1940).
[47] 38 STAT. 219 (1913), 28 U. S. C. §43 (1940).
[48] 38 STAT. 220 (1913), 28 U. S. C. §§44-48 (1940).

The doctrine of administrative finality[49] is especially applicable to rate cases, the technical complexity of which prohibits judicial inquiry on the merits:

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. Cf. *Railroad Commission v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 581-82.
>
> The wisdom of the narrow scope within which Congress has confined judicial participation in the rate-making process is strikingly vindicated by the history of this controversy. . . . There was no ready answer either in law reports or in economic experience. Any solution had to rest on informed judgment. And judgment in a situation like this implies, ultimately, prophecy based on the facts in the record as illumined by the seasoned wisdom of the expert body. In this perspective, the Commission had several choices before it—but all inevitably rested upon trial and error. . . . Of only one thing could the Commission be completely certain: no action could be taken without "adversely affecting certain of the conflicting interests." 164 I.C.C. 619, 698. . . . That the Commission itself was of divided mind in the successive stages of this controversy emphasizes that the problem is enmeshed in difficult judgments of economic and transportation policy. Neither rule of thumb, nor formula, nor general principles provide a ready answer. We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the grain rate structure, only a minor phase of which is caught in the record before us. If we were to grant the relief sought by the appellants, we would be restoring evils which the exclusive rate-break adjustment was designed to remove—evils which, for all we know, would be far more serious than those complained of by the appellants.[50]

Some economic problems are so difficult of solution that it is unfortunate that they have to be decided at all. However, when they are presented some solution must be found, even though it may not be, and may not purport to be, the only possible solution; and where a rate problem of this kind is presented, Congress and the Supreme Court have left no doubt that it is the Commission, and not the courts, which must make the decision and have the last say under the doctrine of administrative finality, subject only to those few well-defined and closely restricted lines of inquiry which the reviewing court may take:

> . . . the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 602. The Commission considered that it had, and we find no reason to doubt that it had, the evidence before it that was needful to the discharge of its duty to the public and to the regulated railroad. "With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusions. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it

[49] Rochester Telephone Corp. v. United States, 307 U. S. 125 (1939).

[50] Board of Trade of Kansas City v. United States, 314 U. S. 534, 546-548 (1942).

were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive." *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541, 550.[51]

C. Other Legal Questions

It has already been pointed out that the two principal legal issues in the *Class Rate* case were the illusory issue of the effect of the Transportation Act of 1940, and particularly the amendment to section 3(1) of the Interstate Commerce Act, on the power of the Commission to remove territorial discriminations, and the further central issue of whether the report and order of the Commission were supported by adequate evidence and had a rational basis, *i.e.*, the issue of arbitrariness. There were, however, other legal questions which will be briefly touched upon below.

1. *Common source of discrimination and alternative remedy—the* Texas & Pacific *case.*

The appellants, largely on the basis of *Texas & Pacific Railway Co. v. United States,* contended that the Commission erred in not giving the carriers a choice between alternative methods of removing the rate discriminations, and they maintained, further, that the Commission had no power to order discriminations removed because different carriers were involved in the two sets of rates. These contentions are based on the following language from the *Texas & Pacific* case:

> A carrier or group of carriers must be the common source of the discrimination, must effectively participate in both rates, if an order for the correction of the disparity is to run against it or them. Where an order is made under §3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both.[52]

The answer to the alternative remedy point is that the order in the *Class Rate* case was not made under section 3[53] but under section 15(1)[54] of the Act. Mr. Justice Roberts pointed out, both in the *Texas & Pacific* case and in *Youngstown Sheet & Tube Company v. United States,*[55] that the alternative remedy doctrine does not apply to orders under section 15(1).

To the contention that the same carriers must control both sets of rates, the answer is that the only rate relationship found by the Commission to be discriminatory was the relationship between the class rates from other territories into official territory on the one hand, and the rates within official territory on the other hand, both sets of which are controlled by the official-territory carriers, which make the latter rates and jointly control the former (interterritorial) rates. It is well settled that it is not necessary that a carrier's rails reach the point subjected to prejudice for it to be guilty of violating section 3(1).[56]

[51] Interstate Commerce Commission v. City of Jersey City, 322 U. S. 503, 512-513 (1944).
[52] 289 U. S. 627, 650 (1933).
[53] 24 STAT. 380 (1887), as amended, 49 U. S. C. §3 (1940).
[54] 24 STAT. 384 (1887), as amended, 49 U. S. C. §15(1) (1940).
[55] 295 U. S. 476 (1935).
[56] St. Louis Southwestern Ry. v. United States, 245 U. S. 136, at 144 (1917); Chicago, I. & L. Ry. v. United States, 270 U. S. 287 (1926).

Finally, serious doubts are cast on the validity of the reasoning in the *Texas & Pacific* case by the dissenting opinion of Mr. Justice Stone, concurred in by Chief Justice Hughes, Mr. Justice Brandeis, and Mr. Justice Cordozo, in which sharp issue is taken with the majority on the issues of the necessity of alternative remedies and a common source of discrimination. After pointing out the fallacies in the majority opinion, the minority reached the conclusion that the situation in the *Texas & Pacific* case was identical with that in the *St. Louis Southwestern* case.[57]

Of course, all of the cases referred to above were decided before the 1940 amendment of section 3(1). The effect of that amendment on the question whether there can be a discrimination between territories, not involving the same groups of carriers, which the Commission is, by the amendment, given power to correct, even though neither carrier is by itself guilty of an unlawful discrimination, has not been before the Supreme Court, and is not before the Court in the *Class Rate* case. There is, however, a strong argument in favor of the existence of such power. The different rate territories, almost by definition, contain separate groups of carriers. If a Missouri shipper, competing in the Twin Cities with an Illinois shipper, must pay freight on the western scale in order to go up the west bank of the Mississippi River to Minneapolis, and suffer a 50 per cent higher freight rate than his competitor across the Mississippi River, who, using another carrier, is shipping on the official rate basis to St. Paul, and the Commission is powerless to correct this discrimination, there is still a serious void in the Commission's power, which was not corrected in 1940 by the addition of the word "territory" to section 3(1) of the Act. Even before 1940, the Supreme Court, in *United States v. Chicago, Milwaukee, St. Paul & Pacific Railway Company,* said that the Commission under section 15 "may conduct a comprehensive inquiry into the rates of all the lines within the area in controversy, may fix the fair relation between one line and another, and may build the structure of the rates accordingly."[58] If the power of the Commission is so narrow that it is precluded from protecting shippers against discrimination unless both rates involved in the rate relationship are controlled by the same carriers, the Commission will find that it is unable to build a rate structure from which discrimination between territories can fairly be said to be absent. Surely, this was not the intention of Congress in 1940.[59]

2. *Preliminary findings.*

The appellants insisted that the Commission had failed to make a number of preliminary findings which they said were essential to support the ultimate findings. There was no unanimity among the appellants about the particular findings claimed to be necessary. The Government contended that a short answer to these contentions was that none of the findings asserted to be necessary was jurisdictional, and "the Commission is not compelled to annotate to each finding the evidence supporting it."[60]

[57] 245 U. S. 136 (1917).
[58] 294 U. S. 499, 509 (1935).
[59] See the discussion of the Transportation Act of 1940, *supra.*
[60] United States v. Pierce Auto Freight Lines, Inc., 327 U. S. 515 (1946).

The principal preliminary finding which the appellants insisted was essential was a finding that the rates in official territory were non-compensatory. Such a finding, it was argued, was prerequisite to the order that these rates be raised 10 per cent. However, where rates are discriminatory their compensatory character is not the decisive factor.[61] Further, the rates in official territory were found by the Commission to be unreasonably low, in violation of section 1 of the Act, and such a finding may be proper even though the rates found unreasonable have been specifically found to be compensatory.[62]

3. *Confiscation.*

The western railroads, in their separate suit and by their intervention in the original action, alleged that the new less-carload rates in the West were shown to be confiscatory on the face of the Commission's report, because of the Commission's finding that the western less-carload rates, which the Commission ordered reduced by 10 per cent, resulted in 1939 in a deficit to the railroads of over thirty-four million dollars. In support of this allegation the western roads, over the objection of the Government,[63] introduced additional testimony in the district court. The infirmities in this confiscation evidence, which the district court found not sufficiently convincing,[64] are too technical to permit discussion in the space available here, but it might be pointed out that less-carload freight accounts for only a very small percentage of total railroad freight tonnage (1.3 per cent in 1944);[65] unlike carload freight, the carriers load it, handle it, and unload it, and it is within their power to make this service expensive to themselves (for example, by light loading of cars) or to keep their costs down to a minimum (for example, by full loading of cars). If rates should be made with the idea of compensating carriers for the most expensive way of handling less-carload traffic, the inevitable result would be to reward inefficiency and to penalize shippers unnecessarily.

The Commission was trying to prescribe a rate structure to eliminate the complicated and chaotic hodgepodge that had grown up in the several rate territories. Isolated differences in costs are bound to exist between railroads and between particular segments of traffic. Although governmental authority cannot single out a particular segment of traffic and require railroads to carry it below cost,[66] no rate structure can make every shipment on every mile of every particular road move at a profit. As Mr. Justice Hughes pointed out in the *Northern Pacific* case, "the ratemaking power may be exercised in a practical way and . . . the legislature is not bound to assure a net profit from 'every mile, section, or other part into which the road may be divided.'"[67] The district court agreed with the Government that if a

[61] Interstate Commerce Commission v. Inland Waterways Corp., 319 U. S. 671 (1943).

[62] Scandrett v. United States, 32 F. Supp. 995 (1940), *aff'd*, 312 U. S. 661 (1941). See also Jefferson Island Salt Mining Co. v. United States, 6 F. 2d 315 (1925).

[63] See Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938).

[64] 65 F. Supp. 856, 869 (1946).

[65] INTERSTATE COMMERCE COMMISSION, STATISTICS OF RAILWAYS IN THE UNITED STATES, 1944 (1946).

[66] Northern Pacific Ry. v. North Dakota, 236 U. S. 585 (1915).

[67] *Id.* at 600.

small fraction of the less-carload traffic might result in loss, this was an incidental and not a deliberate result, in a "mere detail" of a national rate structure, for which it would be improper to set aside the entire rate structure.

V

CONCLUSION

The district court upheld the contentions of the Government all along the line.[68] The district court adopted all of the Commission's findings of fact. While the interim order of the Commission did not bring about absolute equalization of class rates, and did not effect immediate classification uniformity, but only ordered the southern and western rates reduced 10 per cent and the official rates raised 10 per cent, thus leaving these rates about 10 per cent apart, the interim order was premised on the necessity of complete equalization and uniformity, which was delayed only to await the completion of the uniform classification. Thus the upholding of the Commission's order would place final approval on the result toward which the Commission is working—absolute classification and class-rate uniformity so long as differences in territorial transportation conditions are not substantial enough to warrant territorial differences in class rates.

The power of the Commission to correct all interterritorial freight rate discriminations thus seems clear, and no further legislation to that end appears either necessary or desirable. Certainly it would be unwise for Congress to require freight rate uniformity regardless of substantially differing transportation conditions in the territories.

There is only one qualification to this conclusion. It was suggested above that the Commission and the courts have not yet undertaken to pass on the issue of whether a discrimination can be corrected between intraterritorial rates of one territory and intraterritorial rates of another territory. However, for reasons stated above, it is believed that such power exists, and that the Commission could have gone farther than it did in its findings as to discrimination and its order in the *Class Rate* case.

This conclusion concerning the adequate power of the Commission is necessarily divorced from any opinion as to the ability of the Commission to combat railroad conspiracies which may violate the Sherman Antitrust Act. The Commission has all the power it needs to remove all interterritorial freight rate discriminations, and whether these discriminations stem from conspiracies, individual pressures, lack of information about transportation conditions, or inertia is irrelevant to the question of the power of the Commission to remove them. The Commission in the *Class Rate* case has already shown its disposition to remove these discriminations, and the question of conspiracy or monopoly as the source of the discrimination was not and could not properly have been considered by the Commission in making its inquiry

[68] 65 F. Supp. 856 (1946).

and determination. The Commission has no jurisdiction to act on antitrust conspiracies as such. The courts have no jurisdiction to make new rates to eliminate the effects of antitrust conspiracies. The power of the Commission and the power of the courts in connection with interterritorial freight rate discriminations are therefore wholly separate and unrelated powers. The power of the Commission is the power to correct rates; the power of the courts is the power to enjoin or punish conspiracies.

CORRECTIVE ACTION UNDER THE ANTITRUST LAWS

ARNE C. WIPRUD*

For several years prior to March 26, 1945,[1] a widespread controversy raged in and out of Congress over the applicability of the antitrust laws to private companies operating public transportation services, particularly railroad companies. This controversy arose out of investigations instituted by the Department of Justice, through its Antitrust Division, into certain alleged restrictive practices in the transportation field. These investigations culminated in the filing of a number of antitrust suits, the largest of which is the *Association of American Railroads* conspiracy case.[2] Fuel was added by the filing of an original suit in the Supreme Court of the United States by the State of Georgia against eastern and southern railroads, charging a price-fixing conspiracy in violation of the antitrust laws.[3] Practically all railroads in the United States, and their principal associations, are involved in these antitrust suits.

Under the circumstances, it was not surprising that the railroad industry produced the most ardent objectors to antitrust enforcement in the transportation field. The arguments of their spokesmen can be thus summarized: Decisions of the Supreme Court at the turn of the century, holding that railroads were subject to the antitrust laws and that noncompetitive rate-making was prohibited by those laws,[4] have been deprived of their initial vigor by subsequent amendments to the Interstate Commerce Act—that these decisions have become "patent anachronisms."[5] Giving little or no consideration to subsequent decisions of the Court affirming these earlier decisions,[6] they reasoned that the Interstate Commerce Commission's jurisdiction

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[1] On that date the United States Supreme Court rendered its decision on motion of the State of Georgia for leave to file an amended bill of complaint. Georgia v. Pennsylvania R.R., 324 U. S. 439 (1945).

[2] United States v. Association of American Railroads *et al.*, 4 F. R. D. 510 (D. C. Nebr. 1945).

[3] Georgia v. Pennsylvania R.R., cited *supra*, note 1.

[4] United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290 (1897); United States v. Joint Traffic Ass'n, 171 U. S. 505 (1898).

[5] *Hearings before Senate Committee on Interstate Commerce on S. 942, Regulation of Rate Bureaus*, 78th Cong., 1st Sess. 957-970 (1943); TWO MASTERS (1945), pamphlet by C. E. Johnston, Chairman, Western Association of Railway Executives; CHARLES D. DRAYTON, TRANSPORTATION UNDER TWO MASTERS 23 (1946).

[6] Notably the following: Northern Securities Co. v. United States, 193 U. S. 197 (1904); United States v. Union Pacific R.R., 226 U. S. 61 (1912); United States v. Southern Pacific Co., 259 U. S. 214 (1922); United States v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940). In the Socony-Vacuum case, the Court held, affirming its decision in the United States v. Trenton Potteries Co., 273 U. S. 392 (1927), that the rule of reason does not protect combinations operating directly on prices or price structures even though the prices themselves are reasonable.

and control over "every one of the activities" of carriers, particularly over their rates, was complete and therefore there was no area in which the antitrust laws could be applied. Thus the conclusion was reached that Congress had not made competition the keystone of its policy in transportation but had turned to regulation under the standards of the Interstate Commerce Act.[7]

The Department of Justice and the State of Georgia took the other view.[8] They insisted that the early decisions of the Supreme Court had not been "repealed" by Congressional enactment; that the Commission's jurisdiction does not extend to all the activities of the carriers (a view also expressed by the Commission);[9] and that competition within the framework of the regulatory act is still the policy of Congress.

On March 26, 1945, the Supreme Court resolved these legal issues in its decision in *Georgia v. Pennsylvania Railroad Company*.[10] While this decision was rendered pursuant to hearing on jurisdiction, the Court went farther and laid down the law which governs the substantive questions in the case. The case is in the course of trial.

The Court, adhering to its earlier decisions, held that regulated industries are not *per se* exempt from the Sherman Act; that railroads are subject to the antitrust laws; that conspiracies among carriers to fix rates are included within the broad sweep of the Sherman Act; that none of the powers acquired by the Interstate Commerce Commission since the enactment of the Sherman Act relates to the regulation of rate-fixing combinations; that the type of regulation which Congress chose did not eliminate the emphasis on competition and individual freedom of action in rate making; and that "the fact that the rates which have been fixed may or may not be held unlawful by the Commission is immaterial to the issue before us." On the latter point the Court stated:

> The reason is that the Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violations of the antitrust laws. Thus a "zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *United States v. Chicago M. St. P. & P. R. Co.*, 294 U. S. 499, 506. Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by conspiracy among carriers who employ unlawful tactics. If the rate-making function is freed from the unlawful restraints of the alleged conspiracy, the rates of the future will then be fixed in the manner

[7] Elmer A. Smith, *Rate Making and the Antitrust Law*, Railway Age, August 4, 1945; *Hearings before the Senate Committee on Interstate Commerce on S. 942, Regulation of Rate Bureaus*, 78th Cong., 1st Sess. 959-983 (1943).

[8] *Hearings* cited *supra*, note 7, at 5-67; *Hearings before Committee on Interstate Commerce on H. R. 2536*, 79th Cong., 2nd Sess. 739-767 (1946).

[9] The Interstate Commerce Commission states: "There is gross exaggeration in the idea that every act of the railroads is subject to regulation. The railroads have a large degree of initiative in the making of their rates, and have freely made a multitude of reductions to meet competition. We have no power to control their passenger service. They select and pay their officers without supervision or hindrance. Nor do we undertake to tell them what equipment and supplies they may buy, how they shall operate their shops or maintain their tracks, what rails, ballast, and ties they shall use, what stations or other buildings they shall erect, what construction contracts they shall let, or how they shall manage their affairs in many other ways." 52 I.C.C. ANN. REP. 7-8 (1938).

[10] 324 U. S. 439 (1945).

envisoned by Congress when it enacted this legislation. Damage must be presumed to flow from a conspiracy to manipulate rates within that zone.

. . . Any decree which is entered would look to the future and would free tomorrow's rate-making from the coercive and collusive influences alleged to exist. . . .[11]

Again, on the nature of the proceeding as related to the functions of the Commission, the Court stated:

The present bill does not seek to have the Court act in the place of the Commission. It seeks to remove from the field of rate-making the influences of a combination which exceed the limits of the collaboration authorized for the fixing of joint through rates. It seeks to put an end to discriminatory and coercive practices. The aim is to make it possible for individual carriers to perform their duty under the Act, so that whatever tariffs may be continued in effect or superseded by new ones may be tariffs which are free from the restrictive, discriminatory, and coercive influences of the combination. That is not to undercut or impair the primary jurisdiction of the Commission over rates. It is to free the rate-making function of the influences of a conspiracy over which the Commission has no authority but which if proven to exist can only hinder the Commission in the tasks with which it is confronted.[12]

Thus, in all its broad sweep, the Court sustained the position of the State of Georgia and the Department of Justice.[13]

While the *Georgia* case involves an alleged conspiracy among railroads to fix rates, the antitrust laws have broader application in the transportation field. This is evident from the Court's opinion and the cases therein cited. And this view finds emphasis and illustration in the memorandum opinion of the District Court for the District of Nebraska, on motions to dismiss in *United States v. The Association of American Railroads*,[14] rendered since the Supreme Court's decision in the *Georgia* case.

This case, commonly called the *AAR* case, was instituted by the United States against the Association of American Railroads and other industry associations, forty-seven western railroads, two New York banking houses (J. P. Morgan & Company, Incorporated, and Kuhn, Loeb & Company), and sundry individuals who hold directorial or official positions with the several designated corporate and association defendants. Aside from the allegations charging a conspiracy among defendants and their co-conspirators to fix rates detrimental to the West, similar in nature to that charged by the State in the *Georgia* case as harmful to the South, the district

[11] *Id.* at 460-462.

[12] *Id.* at 459-460.

[13] In passing it should be noted that nothing in the minority opinion militates against the views thus expressed as applied to antitrust actions by the United States. On the contrary, the dissenting opinion states: "The support which the Department of Justice lends to Georgia's contentions by the brief amicus, filed in this Court in behalf of the United States, removes any evident need for entertaining this suit. The Government is charged with the enforcement of the antitrust laws, and is authorized by §4 of the Sherman Act and §16 of the Clayton Act to maintain suits for that purpose, which others cannot bring. If it believes that the alleged conspiracy exists and should be stopped by the remedial action of courts, without resort to the Commission, there would seem to be no reason why, avoiding the many technical obstacles to the present suit, it should not proceed to remedy in the usual manner the grievances of the citizens of the United States including citizens of Georgia." *Id.* at 489.

[14] 4 F. R. D. 510 (D. C. Nebr. 1945).

court summarized in its opinion allegations in the complaint charging the conspirators with preventing the construction and introduction of sundry designated advantageous facilities for western shippers; impairing transportation services for western shippers by the arbitrary obstruction of connections and retarding of shipments, especially of perishable products destined to eastern points; exacting from western shippers certain unwarranted accessorial charges; preventing or deferring the installation for the benefit of western shippers and passengers of certain expedited service and improved equipment, and facilities and recreational opportunities for travelers; restricting solicitation of business by individual railroads; and preventing and postponing the development of competitive modes of transportation and travel, notably by motor trucks and motor buses. The district court continued:

> The complaint sets out several illustrative examples of alleged conspiratorial collusion, furthered in some instances by coercive repression of individual conspiring carriers, in the maintenance at an unjustifiably high level of rates for the shipment of freight from, to or within the Western District; in the thwarting of competitive solicitation of low rate passenger traffic; in the exaction from shippers, and notably the plaintiff itself as a shipper of war materials, of extortionate and noncompetitive rates maintained by and in consequence of the combination and conspiracy; and in the artificial and improper manipulation of pipe line and rail rates for petroleum through conspiratory and repressive means.[15]

The district court held, following reference to decisions of the Supreme Court applying the antitrust laws to "interstate common carriers by rail as well as by other means," that the charges in the complaint, "whose general outline has already been sketched, follow the reasonably consistent pattern of accusations under the Antitrust Act sustained in the numerous reported cases. And this is strikingly clear in respect of *State of Georgia v. The Pennsylvania Railway Company.*"[16]

Thus have the courts again restated the Congressional policy of competition in the transportation field and given assurance that that policy, as embodied in the Sherman Act, is in aid of the functions of the Commission in its administration of the Interstate Commerce Act.

There are those in and out of the transportation industry, however, who express concern over the practical consequences if the State of Georgia and the Department of Justice prevail in their antitrust suits against that industry. Their concern seems to be largely with the application of the antitrust laws to rate making. What will happen if the rate bureaus are broken up? Will rate wars result? Are rate wars in the public interest? Is individual rate making by railroads a desirable feature in an industry characterized by huge investments and high overhead costs, one which is so strategic a part of the economy as to have an immediate effect upon the manufacturing, pricing, and distribution of virtually all consumer goods and services?[17]

[15] *Id.* at 516.

[16] *Id.* at 524.

[17] *Hearings before Senate Committee on Interstate Commerce on S. 942, Regulation of Rate Bureaus,* 78th Cong., 1st Sess. 831, 878, 938 (1943); Cherington. review of WIPRUD, JUSTICE IN TRANSPORTATION, 59 HARV. L. REV. 821-824 (1946); *Hearings before Senate Committee on Interstate Commerce on H. R. 2356, Regulation of Rate Bureaus,* 79th Cong., 2nd Sess. 1132 (1946); 58 I.C.C. ANN. REP. 28-31 (1944).

Those who pose these questions have assumed two basic fallacies: namely, that the contention is that rate bureaus are *per se* illegal, and that all carriers are required to make rates in a vacuum. These views find no support in the decisions of any court nor in the statements of any responsible public official.

As the Supreme Court stated in the *Georgia* case, "Under Section 1(4) of the Interstate Commerce Act, it is 'the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges and classifications applicable thereto.' And it is noted that agreement among carriers is provided in the establishment of joint rates. Section 6 . . ."[18] While the Court then held that "collaboration contemplated in the fixing of through and joint rates is of a restrictive [restricted?] nature" (the legitimate area of which it did not stop "at this stage of the proceedings to delineate"), that holding should be considered in relation to the Court's subsequent reference to decisions involving price-fixing under the Sherman Act and its statements on the nature of the relief which it envisaged in the *Georgia* case.

Referring to those cases wherein the Court held that price fixing is *per se* a violation of the Sherman Act, notably *United States v. Socony-Vacuum Oil Co.*,[19] the Court stated: "But we need not at this juncture determine the full extent to which that principle is applicable in the fixing of joint through rates."[20] This further indication of a permissible area of collaboration in the making of such rates is emphasized in the discussion of relief. "It must be remembered," the Court stated, "that this is a suit to dissolve an illegal combination *or to confine it to the legitimate area of collaboration.*"[21] "Dissolution of illegal combinations *or a restriction of their conduct to lawful channels* is a conventional form of relief accorded in antitrust suits. No more is envisaged here";[22] and "We intimate no opinion whether the bill might be construed to charge more than [a conspiracy to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed] *or whether a rate-fixing combination would be legal under the Interstate Commerce Act and the Sherman Act but for the features of discrimination and coercion charged here.*"[23]

Thus has the Court recognized that Congress has given special consideration to the problems of rate making in the transportation field. Competition must be preserved by carriers within the zone of reasonableness. Individual freedom of action in rate making must not be interfered with. Agreements among carriers, however, are permissible in carrying out the Congressional mandate "to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges and classifications applicable thereto." This mandate is found in the Interstate Commerce Act[24] and, as the Court notes, section 6 of that Act provides for agreements

[18] 324 U. S. 439, 457 (1945).
[19] 310 U. S. 150 (1940).
[20] 324 U. S. 438, 458 (1945).
[21] *Id.* at 460. (Emphasis supplied in this and the following quotations.)
[22] *Id.* at 462.
[23] *Id.* at 462-463.
[24] 24 STAT. 379 (1887), as amended, 49 U. S. C. §1(4) (1940).

among carriers to effectuate its purpose.[25] The Court, however, did not stop to define the lawful scope of such agreements. Nor could it do so. Such determination must of necessity follow the presentation of evidence designed to show what is necessary and proper to carry out the Congressional mandate. It seems clear that bona fide negotiations between carriers having as their objective the carrying out of this mandate fall within the lawful area of collaboration. It also seems clear that bona fide negotiations which are necessary and proper to carry out orders of the Interstate Commerce Commission, issued pursuant to the Congressional mandate placed on it with relation to the rates of carriers, are permissible. Such collective activities in rate making are made lawful because they facilitate the free flow of commerce; they become unlawful when they result in undue restraint of trade or in the monopolization of commerce. The test here would seem to be, to paraphrase a historic doctrine: let the end be legitimate, let it be within the scope of the Congressional mandate, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the mandate, are lawful.

There is then no need for abolishing rate bureaus whose activities are confined to such lawful purposes, nor for rate wars. Indeed, the existing regulatory scheme is designed to prevent rate wars through appropriate exercise of the Commission's minimum-rate power. Nor is there need for concern that carriers must, under the antitrust laws, make their rates "in a vacuum." That concept would clearly defeat the mandate of Congress. There is need, however, for a forthright study by the transportation industry of the proper area of collaboration necessary to carry out the Congressional mandate placed directly on the carriers in the making of rates—a factual study that would be of great aid in the present situation. This is the challenge implicit in the Supreme Court's decision in the *Georgia* case.

The transportation industry has not met this challenge. Denying the illegality of the practices that constitute the basis of the serious charges of conspiracy against the people of the South and the West in the *Georgia* and *AAR* cases, the railroads generally, through the Association of American Railroads, have turned to Congress for relief from the antitrust laws for all their collective activities. Their latest effort is the so-called Reed-Bulwinkle Bill, designed to provide the means of exempting from the Sherman Act all agreements between carriers to fix collectively rates, classifications, divisions, allowances, time schedules, routes, the interchange of facilities, the settlement of claims, the promotion of safety, and "the promotion of adequacy, economy or efficiency of operation or service."[26] Thus, according to the Department

[25] 24 STAT. 380 (1887), as amended, 49 U. S. C. §6(1) (1940).

[26] S. 110, A Bill to Amend the Interstate Commerce Act with Respect to Certain Agreements between Carriers, 80th Cong., 1st Sess. (1947). Congress has repeatedly refused to enact legislation exempting rate conferences from the antitrust laws. First refusal, see 21 CONG. REC. 4099, 4753, 5950, 5981, 6208, 6314 (1890); second refusal, see 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 52 (1931); third refusal, see *Hearings before House Committee on Judiciary on Trust Legislation*, 63d Cong., 2nd Sess. vol. 2, 894 (1914); 51 CONG. REC. 9285, 9286, 9582 (1914); SEN. REP. No. 698, 63d Cong., 2nd Sess. 46, 60 (1914); 51 CONG. REC. 14028, 16264, 16344 (1914); fourth refusal, see *Hearings before Senate Com-*

of Justice and the State of Georgia, the railroads seek to render moot the *AAR* and *Georgia* cases.[27]

There are those in the railroad industry, however, who believe that competition within the framework of the regulatory scheme is essential to the continuance of private enterprise in that industry.[28] They oppose complete Government regulation of the railroads as they do monopoly controls. They know that the railroads of the country have published trillions of rates and annually engage in hundreds of millions of different transactions involving millions of different individuals and corporations. They recognize (as the monopolists fail or refuse to recognize) that complete Government regulation of every aspect of this great mass of transactions would result in absolute Government control over the economic destinies of industry, labor, and agriculture—unless the regulated controls the regulator. In either event, the result would be the end of private enterprise in this basic industry, and its eventual nationalization.

In the view of the chief legal officer of one major railroad system, corrective action under the antitrust laws is essential to the welfare of the transportation industry. Recognizing that rate making by carriers presents a problem peculiar to the industry, this official testified that "as far as our philosophy is concerned, agreements on services and facilities which are of a competitive nature are against the public interest. They are things which bring the railroad industry down to the level of the poorest and lowest, and which are simply against the public interest. . . . I want the committee to know insofar as those features of competitive service and facilities are concerned, I do not think that any legislation is necessary because I believe if those agreements are entered into which are unreasonable restraints that the antitrust laws should apply and that if agreements are entered into which are not unreasonable restraints of trade, then the antitrust laws do not apply. . . . I do not understand that the antitrust laws prohibit carriers from discussing and considering their operating, engineering, and other problems or from entering into agreements or taking

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mittee on S. 942, Regulation of Rate Bureaus, 78th Cong., 1st Sess. (1943); fifth refusal, see *Hearings before Senate Committee on H. R. 2536, Regulation of Rate Bureaus,* 79th Cong., 2nd Sess. (1946). The Reed-Bulwinkle Bill (S. 110, 80th Cong., 1st Sess. (1947)), now pending in Congress, is the sixth attempt to set aside the antitrust laws as applied to rate making in transportation. As stated in the text, this bill goes beyond rate making, and covers every phase of public transportation by surface carriers.

[27] *Hearings before Senate Committee on Interstate Commerce on H. R. 2536, Regulation of Rate Bureaus,* 79th Cong., 2nd Sess. 423-424, 744 (1946).

[28] Mr. Robert R. Young, speaking for the Federation for Railway Progress, made the following statement concerning the Bulwinkle Bill: "The Federation for Railway Progress is opposed to the Bulwinkle Bill. We recognize for practical purposes the necessity of maintaining rate conferences in so far as they are suitably regulated. However, we are categorically opposed to any attempt to legalize other noncompetitive practices. For example, this bill would permit agreements among railroads to control such services to the traveler as air-conditioning, streamlining, flowers on dining car tables or even the degree of comfort to be provided in a train seat—with I.C.C. approval. We believe that such competitive services and facilities should be left to the individual initiative of each railroad." Railway Progress, April, 1947, p. 5. The Association of American Railroads takes the opposite view. See *Hearings before the Senate Committee on Interstate Commerce on H. R. 2536, Regulation of Rate Bureaus,* 79th Cong., 2nd Sess. 1073, 1229, 1335, 1453, and 2175 (1946). *Hearings before the Committee on Interstate Commerce on S. 110, Regulation of Rate Bureaus,* 80th Cong., 1st Sess. 9, 123 (1947).

other joint action respecting such matters which do not restrain trade or commerce. . . ."[29] It would seem that this spokesman within the industry has stated the basis upon which private operation of public transportation service can be justified in the public interest.

The controversy over the application of the antitrust laws to the transportation industry, particularly the railroads, since the decisions in the *Georgia* and *AAR* cases, has become primarily a political one. Efforts have been intensified in Congress to provide the means of immunizing the transportation industry, and related interests, from the antitrust laws. Shall those who rule private companies operating public transportation services continue subject to corrective action under the antitrust laws or shall they be permitted to form combinations to control virtually every activity of this industry? This issue cannot be considered apart from its effect upon other businesses and the national economy, for transportation is the basic industry which supplies and controls every industrial and commercial activity. It is clear that those who dominate such combinations could dominate the national economy. Thus, the overriding issue before Congress is whether there shall be legalized monopolization of our transportation systems, with power to dominate the economic life of the nation, or competition within the framework of the regulatory scheme which will preserve private enterprise within that industry and the nation.

[29] Testimony of Robert W. Purcell, vice-president, Chesapeake & Ohio Ry. Co., in *Hearings before Committee on Interstate Commerce on S. 110, Regulation of Rate Bureaus;* 80th Cong., 1st Sess. 145-146, 163 (1947).

HOW SHALL THE RAILROAD RATE STRUCTURE BE REGULATED IN THE PUBLIC INTEREST?*

SIDNEY S. ALDERMAN†

I

OF POLITICAL FOOTBALLS, THE *Georgia* CASE, AND THE *Class Rate* CASE

The general subject of this symposium, interterritorial freight rates, has long been a political football. Whenever a southern politician has been unable to find a real political issue to present to the public, he has had only to pick up this particular football and run with it, to the loud applause of his self-supplied rooting section, to gain wide acclaim and support.

The late Commissioner Eastman adverted to this political aspect of the problem in his dissenting opinion in *Alabama v. New York Central Railroad Company,* where he said:

> The Commission is called upon to decide this case, on the record, after it has in effect been decided, in advance and without regard to the record, by many men in public life, of high and low degree, who have freely proclaimed their views on what they conceive to be the basic issues. Their thesis has been that the section of our country generally known as the South is our "Economic Problem No. 1," because, among other things, it is low in industrial development, and that a major reason for this condition has been and is an unfair adjustment of freight rates which has favored the producers of the North and burdened those of the South. It has become a political issue. While, however, the South gave birth to the issue, public representatives of the West now cry out against like supposed oppression, and public representatives of the North or East, as it is variously called, have risen in defense of their section.
>
> Under such conditions, it is not easy to decide the case without being influenced by emotional reactions, one way or the other, which should play no part in the decision.[1]

The last governor of Georgia to hold office before that state tried the novel experiment of having two governors at the same time, the Honorable Ellis Arnall, ran himself into national prominence carrying this political football in his broken-field

* The subject of this paper, under a slightly different tentative title, had been assigned to and accepted by Mr. Elmer A. Smith, Senior General Attorney of the Illinois Central System, but he was prevented by illness from writing the paper. At a very late date, and with a minimum of time for preparation, Mr. Alderman complied with an urgent request that he write the paper. [Ed.]

† A.B. 1913, Trinity College; graduate, 1916, Trinity College Law School; 1919, Ecole de Droit, Sorbonne University, Paris, France. General Counsel, Southern Railway Company and affiliated lines, since January 1, 1947; General Solicitor, Southern Railway Company, 1930-47. Chief Counsel for southern defendant railroads in the Georgia case, Georgia v. Pennsylvania R.R., 324 U. S. 439 (1945). Special Assistant to the Attorney General of the United States, 1945-1946, serving as Assistant to Mr. Justice Robert H. Jackson, Chief of United States Counsel for the prosecution of the major European Axis war criminals before the International Military Tribunal at Nuremberg. Trustee of Duke University.

[1] 235 I.C.C. 255, 333 (1939). See the dissenting opinion of Mr. Justice Jackson in New York v. United States (the Class Rate case), 67 Sup. Ct. 1207 (1947).

run before the Supreme Court of the United States, in his triple-threat capacity as client, advocate, and press agent, in the *Georgia* case.[2]

Immediately after the arguments on the question whether Georgia should be granted leave to file its bill of complaint in the original jurisdiction of the Supreme Court in that case, Governor Arnall, who made the argument for the State of Georgia, predicted through the press, and quite accurately, the five-to-four division by the Court which followed two months and twenty-two days later, thus demonstrating his prowess as press agent and prophet.[3] He topped off that political touchdown with several brilliant appearances on "Information, Please" and with several ostentatiously recondite articles in the *Atlantic Monthly,* and now he is off on a country-wide speaking tour, and obviously "going places," still carrying the same political football of alleged discrimination against Georgia and the South in interterritorial freight rates.

All these athletics and histrionics completely overlook the fact that the Interstate Commerce Commission, acting pursuant to its exclusive, original, regulatory powers under the Interstate Commerce Act, has entirely wiped out the very disparity in levels of interterritorial class rates[4] which was the sole basis of the complaint of the State of Georgia in that case, and that the Supreme Court has affirmed that action by the Commission, over the violent protest of the eastern states and of the western railroads.[5]

It is pertinent to point out that the political issue with (or on) which Governor Arnall is running is now a moot-ball as well as a football. Also, the positions taken by the states of the North and East and by the railroads of the West, in the court review of the Commission's order in the *Class Rate* case, demonstrate, as Commissioner Eastman had suggested in the above quotation, that the South has no more of a monopoly of talent in the field of political football than it has in the field of intercollegiate football. We may have more flashy individual runners, but certainly no monopoly of talent. As in so many human problems, it is largely a question of whose ox is goared, if the metaphor be changed, or of whose goal line is being crossed, if the metaphor be preserved.

At least, those representing the states of the North and East and the railroads of the West in their assaults on the Commission's equalizing order in the *Class Rate* case followed the traditional and statutory method of appearing before the Commission and then, when aggrieved by its decision, of seeking three-judge-court review of its order, with ultimate appellate review by the Supreme Court, and did not seek, as did the State of Georgia and the Department of Justice of the United States, as

[2] Georgia v. Pennsylvania R.R., 324 U. S. 439 (1945).

[3] Incidentally, in his victory in the first stage of that *cause célèbre,* Governor Arnall ran roughshod over the author of this paper, whose argument against the jurisdiction of the Court to entertain Georgia's bill, made on behalf of the southern railroad defendants, was rejected by the majority of five and was followed only by the late Chief Justice Stone, and by Associate Justices Roberts, Frankfurter and Jackson.

[4] Class Rate Investigation, 1939, Consolidated Freight Classification, 262 I.C.C. 447 (1945).

[5] New York v. United States, 67 Sup. Ct. 1207 (1947).

amici curiae in the *Georgia* case,[6] to by-pass the Commission completely and to have the Supreme Court, in an original suit, deal directly with alleged discrimination in rates by injunction under the Sherman Act, in violation of all previous precedents.

In view of Mr. Eastman's reference to "emotional reactions" which ought to have no influence upon decision of such controversial issues, it is interesting to look at the emotional content of Georgia's position and contentions in that case. The case was brought in the name of the State, by her Attorney General, pursuant to a formal order to the Attorney General issued by Governor Ellis Arnall, in which the Governor made an extraordinary attack upon the Interstate Commerce Commission. The following are recitals made in that highly emotional order:

> Georgia and the South have been shackled to the nation as colonial dependencies subject to economic exploitation, domination and control; and
>
> The prevailing discriminatory freight rate system impeding the development of the South should be ended and the trade barriers erected against the South should be abrogated; and
>
> Georgia and the South should be readmitted to the Union on a basis of full fellowship and equality; and . . .
>
> . . .
>
> The discriminatory and detrimental freight rate structure now imposed upon Georgia and the South is the creature of pernicious sectional politics; and
>
> The Interstate Commerce Commission has been and is derelict in its duty, is a party to the illegal practices herein recited and does condone, aid and abet them; . . .

That reckless charge against the Commission by Georgia through her Governor was made at a time when the Commission had taken volumes of evidence in the *Class Rate Investigation,* had heard Georgia fully in evidence and argument and on brief, and when even such a prophet as Governor Arnall could not know what the Commission's subsequent decision was to be, else he would hardly have made that charge.

What the Commission did, months after the Governor of Georgia made his reckless charge, was to sustain fully the position of Georgia and of the other southern states. It found unreasonable the existing differential in interterritorial class rates from the South and West to official territory, higher than the intraterritorial class rates within official territory, and held that differential[7] to be an unreasonable preference to official territory as a whole and to shippers and receivers of freight located there, as against shippers and receivers of freight in the South and West. In an effort to equalize the situation and to eliminate the preference which it found to exist, the Commission ordered that the existing interstate class rates applicable to freight traffic moving at the classification ratings within southern, southwestern, and western trunk-line territories, interterritorially between those territories, and inter-

[6] I said, in my argument in the Georgia case, that the Department of Justice might be appearing as the "friend of the Court" but that it certainly was not appearing as the friend of the Interstate Commerce Commission.

[7] A differential which the Commission itself had established, in view of differences in conditions between the territories, in a long series of cases. See the discussion in 262 I.C.C. 447, 526 *et seq.* (1945).

territorially between each of those territories and official territory, be *reduced* 10 per cent, subject to unimportant qualifications, and that such rates for freight traffic moving within official territory (the North or East) be *increased* 10 per cent, likewise subject to unimportant qualifications.[8] That action the Supreme Court affirmed.[9]

That action produced the most vigorous attacks from the states of the North and East, whose shippers were subjected to the 10 per cent increase in rates and whose railroads were the beneficiaries of that rate increase for which they had not asked. It produced equally vigorous attack from the railroads of the Southwest and West, which contended that the 10 per cent reduction in their rates was confiscatory. The railroads of the South, which had been the objects of such bitter abuse by the Governor of Georgia, although they were grievously hurt by the 10 per cent reduction in their rates, did not attack the Commission's action in the court proceeding but expressed their willingness to carry out the order.

II

THE SUPREME COURT ALSO SPLITS ON THE *Class Rate* CASE

The decision by the Supreme Court in the *Class Rate* case,[10] handed down on May 12, 1947, comes appropriately to hand just before this symposium goes to press. This is fortunate, because otherwise this issue of LAW AND CONTEMPORARY PROBLEMS ran the risk of being as moot as Governor Arnall's political issue. Current events move so swiftly that it takes fast footwork to keep "contemporary."

Following a well-developed habit of recent years, the Court was sharply divided on this case. Mr. Justice Douglas wrote for the majority an elaborate opinion of sixty-two printed pages. He reviewed the Commission's proceedings and decision in great detail. He pointed out that "the Commission's over-all conclusion was that the classifications in force and the class rates computed from them harbor inequities which result in unlawful discriminations in favor of Official Territory and against the other territories."[11]

He recognized that "it is, of course, obvious that the causal connection between rate discrimination and territorial injury is not always susceptible of conclusive proof. The extent of that causal relation cannot in any case be shown with mathematical exactness. It is a matter of inference from relevant data."[12] He made an elaborate review of much of the data from which the Commission drew its ultimate inference of prejudice and discrimination against the South and West and preference of official territory. In the main it was the old story that the East is far more highly industralized than the other territories, "in spite of recent marked increases elsewhere, especially in the South."[13]

[8] See Mr. Justice Douglas' opinion for the Supreme Court in New York v. United States, 67 Sup. Ct. 1207, 1212-13 (1947).
[9] *Ibid.*
[10] New York v. United States, 67 Sup. Ct. 1207 (1947).
[11] *Id.* at 1220. [12] *Ibid.* [13] *Id.* at 1221.

Without substituting its own independent judgment on the basic question, the majority of the Court in effect bowed to the expert, administrative judgment of the Commission in drawing the inference, from the mass of data before it, that the disparities in rates between the territories reflected something more than differences in natural advantages justifying differences in rates.

The majority indulged this traditional deference to the Commission's informed, expert judgment in refusing to give effect to the principal argument of the northern states, which the Court stated as follows: "It is, therefore, argued that what the Commission has sought to do is to equalize economic advantages, to enter the field of economic planning, and to arrange a rate structure designed to relocate industries, cause a redistribution of population, and in other ways to offset the natural advantages which one territory has over another."[14]

The majority bowed to the Commission's expert judgment on elaborate cost studies, pointing out that "these problems of transportation economics are complicated and involved."[15] It supported the Commission's judgment on these complicated questions for the reasons stated in *Board of Trade v. United States:*

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.[16]

It was on that ground that Mr. Justice Douglas' opinion overruled the vigorous contention of the western railroads that the 10 per cent reduction in their rates was confiscatory. The showing of confiscation, he said, was not conclusive, hence an empirical experience under the new rates should be accumulated to determine the correct answer to "a problem which is in flux." The western roads could go back to the Commission after that empirical experience. "The Commission," said the opinion, "has not placed the western roads in a strait-jacket."[17]

But the majority opinion evoked sharp dissents from Mr. Justice Frankfurter and Mr. Justice Jackson.

The former saw the Commission's decision as fatally defective in that, while it undertook to remove a discrimination against the other territories and a preference in favor of official territory, it did not make necessary findings to show that the remedies proposed fitted the requirements of reasonableness of rates. He said there was no showing that the Commission's remedy produced equality among the territories and, in characteristic phrase, added: "The Procrustean bed is not a symbol of

[14] *Id.* at 1223.

[15] *Id.* at 1234.

[16] 314 U. S. 534, 546 (1942). That quotation might well be the text for the thesis of this paper, which is, quickly and directly stated, that the freight rate structure can only be regulated in the public interest by the Interstate Commerce Commission under the Interstate Commerce Act as amended, and that nothing but chaos can be the result of attempts by the Department of Justice to substitute for that regulation a case-by-case interference with the rate structure by court cases brought under the antitrust laws.

[17] New York v. United States, 67 Sup. Ct. 1207, 1236 (1947).

equality. It is no less inequality to have equality among unequals. The findings do not reveal how it happened that putting 10 per cent on and taking 10 per cent off respectively will beget just the right adjustment."[18] He concluded:

> Administrative experts no doubt have antennae not possessed by courts charged with reviewing their action. And so it may well be that to the expert feel the justifiable correction to an imbalance between Official Territory rates and the rates of other territories is a shift of 10 per cent in the respective rates—Official Territory rates increased 10 per cent and rates elsewhere decreased 10 per cent. But courts, charged as they are with the review of the action of the Commission, ought not to be asked to sustain such a mathematical coincidence as a matter of unillumined faith in the conclusions of the experts.[19]

In a separate dissent, in which, however, Mr. Justice Frankfurter joined, Mr. Justice Jackson was more forthright and less metaphorical in his criticism of the majority opinion. He used language reminiscent of his recent experience as a prosecutor, starting with: "I find it impossible to agree with this extraordinary decision"[20]—and warming up from that start forward.

He pointed out that the 10 per cent rate increase affecting the northeastern part of the United States was not asked by the railroads in that territory, that it "goes to the prosperous and the insolvent ones alike, and is not even claimed to be necessary to pay the cost of service and a fair return on the property used in rendering it."[21]

"This additional assessment," he said, "is in no sense compensation for handling the traffic which the railroads concede was adequately compensated before. It is really a surtax . . . added solely to increase shipping costs in the Northeastern part of the United States for the purpose of handicapping its economy and in order to make transportation cost as much there as it does in areas where there is less traffic to divide the cost."[22]

He pointed out the concession that the alleged discrimination in favor of the Northeast could not be removed by reducing the higher rates in the South and West by more than 10 per cent, "because the railroads of the South and West, in view of their costs, could not bear further decrease. So the only other way of equalizing the rates and making it as costly to move goods there as anywhere in the United States, is to make the shippers in the Northeastern territory pay the railroads this additional 10 per cent which they have not asked and do not need."[23]

"The Court's approval of this order," he declared, "is based on an entirely new theory of 'discrimination.' It has never before been thought to be an unlawful discrimination to charge more for a service which it cost more to render.[24] Discrimination heretofore has been found to exist only when an unequal charge was exacted for a like service, or vice versa. But now it is held to be an unlawful discrimination if railroads of the Northeast do not make the same charge as other railroads in the

[18] *Id.* at 1247. [19] *Id.* at 1249. [20] *Id.* at 1242.
[21] *Ibid.* [22] *Ibid.* [23] *Ibid.*

[24] This has been the basic thesis of the railroads of the South throughout the years of controversy over the interterritorial freight rate relationships. It had always been the Commission's basic thesis prior to its decision in this case.

South or West, for a different transportation under different cost conditions. The Government frankly advocates this new concept of discrimination as necessary to some redistribution of population in relation to resources that will reshape the nation's social, economic, and perhaps its political life more nearly to its heart's desire."[25] He made a long quotation from the Government's brief[26] showing that such was exactly the new concept advocated by "the Government," which means, in this instance, the doctrinaires of the Department of Justice. And following that quotation he said: "The Court's entire discussion of the discrimination feature of this case is an acceptance of the Government's position without which the last support for this order would fail."[27]

On the basic legal question he was categorical, saying:

> No authority can be found in any Act of Congress for the imposition of this surcharge on the Northeast solely to penalize it for being able to transport goods cheaper due to its density of population and volume of traffic. The policy of Congress remains as it long has stood: "adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service." Interstate Commerce Act, §15a(2). . . . Congress has never intimated, much less declared a purpose to deprive the territory in which fifty per cent of the nation's consumers reside of the benefit of this policy. . . .
>
> The Court never before has confided to any regulatory body the reshaping of our national economy. In *Texas & Pacific R. Co. v. United States,* 289 U. S. 627, the following statement of the law was made: "a tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful; and obviously, what the carrier may not lawfully do, the Commission may not compel."[28]

He showed that the Commission has heretofore accepted that statement as the law and held that it is not within its power "to equalize natural disadvantages of locations"[29] or "to equalize commercial conditions."[30]

Mr. Justice Jackson recognized the difficulty of the problem with which the Commission had to wrestle and commented wisely:

> I long have heard the complaint that freight rates discriminated against the South. I have been inclined to suspect it to be true and have hoped to see an impartial and exhaustive study and decision on the subject. But this case does not meet that description. The student of economics will be puzzled at the Court's citation of the fact that the average employed person in the South earns only half as much as those in the Northeast as being in some way attributable to these freight rates. And the student of the judicial process will find instruction in the contrast between today's decision and that of *Interstate Commerce Commission v. Mechling* [67 Sup. Ct. 894 (1947)], in its regard for inherent advantages, in its attitude to "unsifted" averages as a basis for raising rates and in its deference to the administrative expertise of the Interstate Commerce Commission. . . .
>
> But by administrative succession and judicial fiat the regulatory power of the Federal Government over commerce is now used to force a surtax on transportation of one section

[25] *Id.* at 1242-1243. [26] *Id.* at 1243. [27] *Ibid.*
[28] *Id.* at 1243-1244.
[29] Stoves, Ranges, Boilers, and House-Heating Furnaces, 182 I.C.C. 59, 68 (1932).
[30] *Id.* at 74.

of the country admittedly not needed to compensate the railroad for the carriage but to take away from its inhabitants one of the advantages inherent in its density of population, regardless of the disadvantages which density of population also causes.

The observation of Commissioner Mahaffie in this case seems to me appropriate and accurate:

> ". . . In a country so vast as this with its widely varied resources and differing transportation needs it seems to me a mistake to try to compel general equality in rates except to the extent equality is justified by transportation conditions. I think the effort to do so must necessarily fail. But I am afraid the process of finding out whether it can be done will be painful and costly. The prejudice findings on which the new adjustment is largely predicated are calculated, if carried to a logical conclusion, to lead to a rigid rate structure based on mileage. While this may seem on its face to be equitable its accomplishment would entail radical industrial and agricultural readjustments. I doubt if the country should be required to incur the expense of making them." (262 I.C.C. at 708.)[81]

If the author of this paper were privileged to vote on the merits of the *Class Rate* case, he would unhesitatingly vote with Justices Frankfurter and Jackson and Commissioner Mahaffie. He is profoundly convinced that the Commission was finally pushed by the unceasing political drives of the Southern Governors and of the representatives of the West to seek a mythical equality by disregarding controlling industrial, commercial and transportation differences between those sections and the Northeast.

However, that in no wise alters his basic thesis that the rate structure can be regulated in the public interest only by the Interstate Commerce Commission under the Interstate Commerce Act, and that nothing but chaos can result from the efforts of the Department of Justice to interfere with that regulation, or to take it over, by antitrust cases in the courts.

The railroads of the South, on whose behalf the present writer is speaking without their authorization, view the logomachy over the class rates with pained but philosophical detachment. They have had ten per cent of their rate legs lopped off on the bed of Procrustes but they have had the fortitude to take that torture and to try to continue to serve the South, walking on their truncated and bloody stumps. They did not attack the Procrustean order. They took it.

Yet, even as this is being written, the representatives of Georgia are vigorously arguing before the Special Master of the Supreme Court in the *Georgia* case that the railroads of the South have conspired with the northern lines to discriminate against the South, from which we get our living, and to prefer the Northeast, from which the northern carriers get their living. It is further—and with utter inconsistency—argued that the northern carriers have coerced and controlled us so as to give us more favorable rates than the northern carriers themselves have enjoyed. A strange conspiracy; it sounds like Alice in Wonderland.

[81] New York v. United States, 67 Sup. Ct. 1207, 1245-1246 (1947).

III

The Department of Justice Enters the Political Arena of Freight Rates

One of the most important lessons of the Nuremberg trial and its searching autopsy of the Nazi leadership is that propaganda is a weapon by no means peculiar to "special interests" in the narrow sense, or to politicians running for office, but that it is one of the habitual and most powerful weapons of governments, heads-of-state, self-constituted Führers, and all the tribe of bureaucrats,[32] in whose hands it ranks in destructiveness second only to the atomic bomb.

In recent years a clique in the Antitrust Division of the Department of Justice, under the inspiring leadership of the garrulous and ubiquitous Thurman Wesley Arnold[33] and carried on by his disciples Wendell Berge,[34] Arne C. Wiprud,[35] and James E. Kilday,[36] has been propagandizing throughout the length and breadth of this country in a double attack against the Interstate Commerce Commission and against the railroads. Their thesis is that the conference method of rate making by the railroads, through rate conferences and bureaus, is a vast conspiracy in violation of the antitrust laws, and that the Interstate Commerce Commission—together indeed with many other governmental agencies—has compounded, condoned and officially approved this conspiracy.

It is the obvious purpose of these gentlemen to destroy the Interstate Commerce Commission and its jurisdiction over rate-making and to substitute for its regulation under the Interstate Commerce Act a case-by-case regulation by the Antitrust Division of the Department of Justice and by the courts under the antitrust laws. That purpose is exemplified by the conduct of the Department in its appearance in the

[32] "Crat," from the Greek, means "the strong man." The bureaucrat is "the strong man of the bureau." "Bureau" is a most interesting word. It comes from the French *bure*, meaning the green baize cloth with which government desks used to be covered. This green cloth had an inherent and limitless capacity for self-extension. By the first extension the word came to mean the desk itself covered with the green cloth, *le bureau*. By another extension it came to mean the office or room in which a government functionary sat at that green-covered desk. "Bureaucrat" was the strong government functionary at that desk in that office. Bureaucracy is the strength of government departments. It still has the inherent tendency to spread all over the place.

[33] Member, Wyoming Legislature, 1921; Mayor, Laramie, Wyo., 1923-24; Dean of Law School, University of West Virginia, 1927-30; Professor of Law, Yale University, 1930-38; Board of Visitors, Harvard Law School, 1944-; Assistant Attorney General in charge of Antitrust Division, Department of Justice, 1938-43; Associate Justice, U. S. Court of Appeals, D. C., 1943-45; now head of the firm of Arnold and Fortas, general practice of law, Washington, D. C. Author, *inter alia*, of: The Symbols of Government (1935); The Folklore of Capitalism (1937); The Bottlenecks of Business (1940); Democracy and Free Enterprise (1942); Cartels or Free Enterprise? (1945). [From his autobiographical note in 1 Martindale-Hubbell, Law Directory 271 (1947).] Recently announced as one of the trustees of the estate of the late Evalyn Walsh McLean and joint custodian of the Hope Diamond.

[34] Who recently resigned as Assistant Attorney General, in charge of the Antitrust Division, Department of Justice, to enter private practice, after holding his position just long enough to make the opening statement for the Government in the Lincoln, Nebraska, case, United States v. Association of American Railroads, *et al.*, 4 F. R. D. 510 (D. C. Nebr. 1945).

[35] Until recently Special Assistant to the Attorney General in the Antitrust Division of the Department of Justice. Author of Justice in Transportation (1945). It is understood that he has recently joined the staff of Mr. Robert R. Young, of the Chesapeake & Ohio group of railroads, presumably to help the latter in his current attack on the rest of the railroad industry.

[36] A subordinate in the Antitrust Division.

Georgia case as *amicus curiae* and by its complaint and arguments in the Lincoln, Nebraska, suit.

These gentlemen, who are no shrinking violets, try their cases first by propaganda, in the press, in books, and in public addresses, and only secondarily in the courts, which are made sounding-boards for further propaganda. I observe that Mr. Wendell Berge is included in this symposium for a paper under the title *The Rate-Making Process.* I have no doubt that his paper will be substantially the same as his opening statement of the case for the Government in the Lincoln, Nebraska, case. I also have no doubt that it will disclose his basic thesis that railroad rate-making should be regulated by the Department of Justice and the courts in suits under the antitrust laws rather than by the Interstate Commerce Commission under the Interstate Commerce Act.

It is further noted that Mr. Arne C. Wiprud is included in this symposium for a paper entitled *Corrective Action Under the Antitrust Laws.* It is to be anticipated that his paper will elaborate the thesis of the Department's campaign and of his book, *Justice in Transportation.*

Finally, it is observed that Mr. Robert R. Young, Chairman of the Board of Allegheny Corporation and of the Chesapeake & Ohio Railway Company, is listed for a paper entitled *A National Transportation Policy.* It is doubted that his paper will be a discussion of *the* national transportation policy declared by Congress in the Transportation Act of 1940. It may well be anticipated that it will present Mr. Young's personal ideas as to how he would reshape a new transportation policy and will exemplify the campaign he has been broadcasting, in the press, on the radio, in advertisements, and in testimony before Congressional committees, against all the railroad industry of the United States except the small segment which he claims to control.

Shortly after the *Georgia* case and the case at Lincoln, Nebraska, were brought, and even before the procedural and jurisdictional questions involved could be argued before the respective courts, Mr. Arne Wiprud, following the fixed pattern of the Antitrust Division of trying its cases first by propaganda to the public, published a book entitled *Justice in Transportation,* which frankly sought "to carry the issue to the public." It contains an introduction by Thurman Wesley Arnold. It is a brief for the Government's theory in the Lincoln, Nebraska, suit.

That book is not only a bitter attack against the railroads and against the whole conference method of rate-making, but it is an equally bitter attack against the Interstate Commerce Commission, past and present. Not content with that, it attacks the Congress (inferentially, at least), three Presidents of the United States, the wartime Secretary of War and Secretary of the Navy, the Director of the Office of Defense Transportation, the War Production Board, the Civil Aeronautics Board, the Bituminous Coal Commission, and virtually everybody in authority except the Department of Justice.

The present symposium is not the place for any attempt at detailed answer to

Mr. Wiprud's book and Mr. Arnold's introduction. Quite a bibliography has built up around that book. A very vigorous, historical and thoroughly documented answer to it has been made by Charles D. Drayton, of the District of Columbia bar, in a book entitled *Transportation Under Two Masters,* with a foreword by Bernard M. Baruch. A scholarly and critical appraisal of Mr. Wiprud's book was made by Mr. Elmer A. Smith in an article in *Railway Age*[37] on August 4, 1945. A penetrating discussion of the whole subject of the application of the antitrust laws to regulated industries, and a further answer to the thesis of Mr. Wiprud's book, from the pen of Mr. Elmer A. Smith, appeared in 1946.[38] A further discussion of the same problem by Mr. Smith appeared in the American Economic Review Proceedings in May, 1946.[39]

Those who may have been impressed by Mr. Wiprud and Mr. Arnold in *Justice in Transportation* would do well to read the above-cited discussions before making up their minds as to whether it is in the public interest for the Interstate Commerce Commission to continue to regulate railroad rate-making under the Interstate Commerce Act or whether that regulation should be taken over by the Antitrust Division of the Department of Justice by antitrust suits in the courts.

This campaign by the Antitrust Division of the Department of Justice against the railroads and against the Interstate Commerce Commission, to interfere with and disrupt the Commission's regulatory jurisdiction and to subject railroad rate making to Sherman Act supervision, first broke into the open in 1942 when the Division sought indictments against a large number of railroad traffic officers for alleged violations of the Sherman Act in the making of rates. The other departments of the Government, which were engaged in the prosecution of the war, and which knew the tremendous contribution the railroads were making to its prosecution, persuaded the Attorney General to discontinue the proceedings because to have carried them on would have seriously disrupted the contribution of the railroads to the war effort.

This was the first serious attempt by the Government in forty-four years, since the decisions in *United States v. Trans-Missouri Freight Association*[40] in 1897, and in *United States v. Joint Traffic Association*[41] in 1898, to subject railroad rate making to the Sherman Act. And during those forty-four years a wholly antithetical philosophy of regulation by an agency of Congress, the Interstate Commerce Commission, had been progressively built up and made effective by Congress. The doctrinaires of the Department of Justice would wipe out those forty-four years of history and return us to the wholly inconsistent philosophy of 1898.

The Antitrust Division followed up its campaign by joining hands with the State of Georgia in its suit in the Supreme Court and by bringing its antitrust suit at Lincoln, Nebraska.

[37] Smith, *Rate-Making and the Antitrust Law,* 12 I.C.C. Practitioner's Jour. 1117-1135 (1945), reprinted from Railway Age, Aug. 4, 1945, p. 208.

[38] Smith, *The Application of the Antitrust Laws to Regulated Industries,* 14 I.C.C. Practitioner's Jour. 181-200 (1946).

[39] Smith, *The Interstate Commerce Commission, The Department of Justice, and the Supreme Court,* 36 Am. Econ. Rev. Proceedings 479 (1946).

[40] 166 U. S. 290 (1897).

[41] 171 U. S. 505 (1898).

IV

THE BULWINKLE BILL

This campaign by the Department raises a question of tremendous public importance. It is the question whether the nation's carriers are to be subjected to two different and necessarily inconsistent policies of regulation: the Interstate Commerce Act policy, administered by the agency Congress has empowered to carry out that policy, and a Sherman Act policy, to be administered by an agency of the Executive through court actions. It is obvious that the railroads cannot function under two such masters. The two policies are in irreconcilable conflict.

The question concerns the shippers of the country as gravely as it does the carriers. The shippers are opposed to the philosophy of the Department of Justice with a unanimity such as has never before been seen on any public question. So are all other departments and agencies of the Federal Government and so are the regulatory commissions of the states. Everybody is out of step but the Department of Justice. Nobody else wants "Justice" (the Department) "in transportation" beating around on the delicate rate structure with its Sherman Act bludgeon.

Pursuant to a virtually universal demand for a clarification of the conflict of philosophies produced by the campaign of the Department, the so-called Bulwinkle Bill[42] is pending in Congress.

It is not, as it has often been misrepresented to be, a bill generally to exempt the railroads from the antitrust laws. It would make it perfectly clear that agreements by carriers through the conference and rate-bureau method of rate making would be subject to regulation by the Interstate Commerce Commission and that, when approved by that body as in furtherance of the national transportation policy, such agreements would be exempted from the antitrust laws. The effect of the bill is clearly explained in the House Committee report as follows:

> The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body upon a finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted.
>
> The bill provides for no relief from any provision of law other than the antitrust laws. Notwithstanding the approval of an agreement by the Commission, all provisions of the Interstate Commerce Act will apply to the carriers and to action taken by them to the same extent and in the same manner as though such agreement had not been approved.[43]

The indispensable necessity of the preservation of the conference and bureau method of rate making and of clarifying legislation like the Bulwinkle Bill cannot be better shown than by the following quotation from the testimony of Mr. East-

[42] H. R. 2536, 79th Cong., 2d Sess. (1946).
[43] H. R. REP. No. 1212, 79th Cong., 1st Sess. 6 (1945).

man[44] in support of a like bill in the first session of the Seventy-eighth Congress. He said:

> The railroads of the country constitute a connected and interlacing system of lines over which freight cars of all ownerships circulate freely, and a very great part of the traffic moves under joint rates in which at least two and often many separate railroads participate. The same is true, although in lesser degree, of the other carriers. It is also true that there is a great interdependence between rates. Where there is more than one route between two points, as a practical matter the rates must ordinarily be the same over all the routes. Even in the case of rates from widely separated origins to a common market, a change in one of the rates may impel changes in them all. A change in the rate basis on one commodity between certain points may even force changes in the rates on other commodities between different points.
>
> It must be evident to any reasonable man that the carriers cannot respond to all the duties imposed by law, if each individual carrier acts in a vacuum. It is a situation, under all the conditions, which plainly calls for consultation, conference, and organization and for many acts of a joint or cooperative character; and this seems, in effect, although some of the testimony might suggest otherwise, to be admitted by the Department of Justice. For my own part, I have no doubt whatever that organizations of the carriers, such as have been described by witnesses which have preceded me, in general serve a very useful purpose and are desirable in the public interest. They save much trouble for the shippers, as I believe the shippers will tell you. In saying this, I do not mean to imply that these organizations are not subject to abuse or that they should not be brought under some measure of public regulation. I shall go into that matter when I come to the discussion of the bill which is before you.
>
> At this point, however, let me make a general observation. These so-called rate bureaus and other like organizations of the carriers are not new. They have existed and have functioned for many years, and so far as the railroads are concerned, they had their roots in the past which antedated the creation of the Interstate Commerce Commission. The shippers of the country are well organized and are very much alive to their own interests, as they have repeatedly demonstrated.
>
> . . .
>
> If the rate bureaus and the like had, over their long history, been the source of grave abuse which prejudiced seriously the interest of the shippers, you may be sure that long since there would have been an uprising and that this situation would have been made clear to you by a heavy tide of complaints pouring into the Commission and into the Congress of the United States. If there has been or is such a tide, it has somehow escaped my knowledge. I believe this hearing will demonstrate that such complaint as there is has its source, not in the shippers of the country, but in the lawyers and economists of the Department of Justice.[45]

That testimony was discussed and made a part of the record in the hearings on the Bulwinkle Bill in the Seventy-ninth Congress.[46]

As shown by the committee report following those hearings,[47] not a witness

[44] The late Joseph B. Eastman, then Director of the Office of Defense Transportation and formerly Chairman of the Interstate Commerce Commission, acknowledged leader in the field of railroad regulation.

[45] *Hearings before the Senate Committee on Interstate Commerce on S. 942*, 78th Cong., 1st Sess. 830-831 (1943).

[46] *Hearings before the Committee on Interstate Commerce on H. R. 2536*, 79th Cong., 1st Sess. (1945).

[47] H. R. Rep. No. 1212, 79th Cong., 1st Sess. 3 (1945).

appeared in opposition to the bill. It had the virtually unanimous support of all interests directly interested in transportation, including governmental authorities, Federal and state, carriers of all kinds, shippers throughout the country, railroad labor, and agricultural and livestock interests.

The Attorney General wrote a letter stating that he did not favor the bill in its existing form. Governor Arnall of Georgia, by a telegram, expressed opposition to the bill. He was invited by the committee to appear and testify, but he did not appear. This letter and this telegram were the only opposition to the bill.

The House passed the bill by a vote of 277 "yeas" against 45 "nays."

The Senate committee held hearings on that bill[48] in March, April, and May, 1946, and built up a record of 2,416 pages. There was the same substantial unanimity of all interests of the country, except the Department of Justice, in support of the bill. Messrs. Thurman Arnold, Wendell Berge, and James E. Kilday appeared against it.

On June 18, 1946, the bill was reported favorably, with certain amendments, by the Senate Committee, but ran into the legislative jam at the end of the session and did not come to a vote on the floor.

Hearings[49] were again held by the Senate committee at the present session on S. 110 (the Bulwinkle Bill, H. R. 2536, with the amendments as reported by that committee in the previous Congress), on January 21 and February 4, 1947. There was the same substantial unanimity of all interests save the Department of Justice in support of the bill. Mr. Wendell Berge, Mr. James E. Kilday, and Mr. Arne C. Wiprud appeared, and the Attorney General filed a short statement, in opposition.

That is the present status of the public reaction to the Department's campaign to subject carrier rate making to Sherman Act regulation. The facts are more eloquent than words could be.

The latest expression by the Interstate Commerce Commission on the subject is in its Sixtieth Annual Report, November 1, 1946, in which, after reviewing the prior proceedings on the Bulwinkle Bill and its previous recommendations that it be passed, the Commission said:

> In previous reports we have expressed the fear of danger that undue breadth in interpreting and applying the Sherman Antitrust Act may interfere with carrying out the national transportation policy declared in the preamble to the Interstate Commerce Act, which forbids "unfair or destructive competitive practices." We believe that this danger still exists and are therefore recommending elsewhere in this report that the Congress by appropriate legislation remove the continuing uncertainty concerning the legality of joint action by carriers and freight forwarders subject to the Interstate Commerce Act, exercised through rate bureaus and conferences.[50]

[48] *Hearings before the Senate Committee on Interstate Commerce on H. R. 2536*, 79th Cong., 2d Sess. (1946).

[49] *Hearings before the Senate Committee on Interstate and Foreign Commerce on S. 110*, 80th Cong., 1st Sess. (1947).

[50] 60 I.C.C. ANN. REP. 53 (1946).

V

The New Policy for Public Regulation of Railroads, Built Up Since 1898, Is a Complete Departure from the Sherman Act Philosophy of Unbridled Competition

The Interstate Commerce Act,[51] which created the Interstate Commerce Commission and inaugurated the new public policy for special, public regulation of railroads, became law on February 4, 1887, more than three years before the enactment of the Sherman Act[52] on July 2, 1890.

The legislative history of the later Sherman Act shows clearly that the Congress did not intend that Act to apply to railroads, because it was deemed that the prior Interstate Commerce Act covered their regulation.

Mr. Wiprud[53] makes a generalized assertion to the contrary, declaring that the legislative history of the Sherman Act shows that Congress intended to include railroads and their rate-making conferences within its prohibitions. But a careful analysis of that legislative history[54] demonstrates exactly the reverse.

The Sherman Act passed the Senate in the precise form in which it now appears on the statute books. In the House, Congressman Bland of Missouri offered an amendment which provoked the only disagreement between the two Houses. This would have inserted an express clause outlawing every contract or agreement "to prevent competition in the transportation of persons or property from one State or territory to another."

When the House returned the Senate bill with the Bland amendment, the Senate in turn amended the House amendment so as to make it outlaw only such transportation contracts or agreements as had the effect of raising transportation rates "above what is just and reasonable." The House managers in conference accepted the Senate amendment. This would have left the power of defining and determining "just and reasonable rates" where it was thought to have been vested by the Act to Regulate Commerce of 1887, in the Interstate Commerce Commission.

The debates show clearly the prevailing view that the House amendment was not germane to the Sherman Bill because that bill was not intended to cover matters already regulated by the Act to Regulate Commerce. And on that ground, in a subsequent conference report, each house receded from its respective amendment, with the result that the original Senate bill passed without amendment, the precise form in which the Sherman Act appears on the statute books today.

That legislative history makes it entirely clear that Congress did not intend the Sherman Act to cover and regulate railroads in their rate making, because it was thought that that field of regulation had been covered by the Act to Regulate Commerce.

However, in the decade following the enactment of the Sherman Act, the Su-

[51] 24 Stat. 379 (1887), 49 U. S. C. §1 *et seq.* (1940).
[52] 26 Stat. 209 (1890), 15 U. S. C. §§1-7 (1940).
[53] Arne C. Wiprud, Justice in Transportation 110-111 (1945).
[54] See Charles D. Drayton, Transportation Under Two Masters 13-22 (1946).

preme Court, in a series of cases,[55] held that the Interstate Commerce Act had conferred on the Interstate Commerce Commission no power whatsoever to fix or prescribe rates, either maximum or minimum, with the result that the Interstate Commerce Act, as so construed, was no effective regulation of railroad rate making.

It was on this very ground that the Court held, first in the *Trans-Missouri Freight Association Case*,[56] by a five-to-four decision in 1897, and secondly in the *Joint Traffic Association Case*[57] in 1898, that the Sherman Act applied to traffic association agreements for the fixing of freight rates.

The law at that time in our history left carrier rate making to the rule of the claw and the fang, to unbridled and unregulated competition under the philosophy of the Sherman Act, because the Commission had no power to regulate it under the Interstate Commerce Act as then construed.

The Government, in the second of those two cases, recognized the extent to which the then prevailing doctrine of unbridled and unregulated competition would enable the larger and more powerful railroad to destroy the weaker. The Solicitor General, in his closing argument in that case, said:

> It may be conceded that the law of the survival of the fittest is a hard one; that the necessity of competition under existing conditions presses heavily upon the weak. But, after all, competition is not only the life of trade, but the underlying basis of our social and industrial life. There may be a better way, but we have not yet found it.[58]
>
> . . .
>
> Competition drives the weak to the wall, the fittest survive, but the greatest good to the greatest number results. . . .
>
> The best railroad, the one constructed and equipped and managed in the best way, will get the bulk of the competitive business, and it ought to. It can afford to carry the traffic at lower rates than the poorer roads, and it ought to be allowed to, in the public interest.[59]

Of the Interstate Commerce Act as it then existed he said:

> The Interstate Commerce law declares that all charges must be reasonable and just. It provides no means for securing this desideratum except competition.[60]

And he pointed out the complete lack of rate-making power by the Commission, saying:

> The common law requires that rates shall be reasonable and fair. So does the Interstate Commerce law. But this is a mere declaration, and there is no adequate remedy to enforce the right. The commission has no power to prescribe a reasonable rate and enforce it, or to declare that a rate is unreasonable and prohibit it.[61]

And the Court, in the *Joint Traffic Association Case*, squarely recognized the reach and thrust of that prevailing claw-and-fang philosophy. Mr. Justice Peckham said:

[55] United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290 (1897); I.C.C. v. Cincinnati, N. O. & T. P. Ry., 167 U. S. 479 (1897); I.C.C. v. Alabama U. Ry., 168 U. S. 144 (1897); and United States v. Joint Traffic Association, 171 U. S. 505 (1898).

[56] 166 U. S. 290 (1897).

[57] 171 U. S. 505 (1898).

[58] *Id.* at 546.

[59] *Id.* at 547-548.

[60] *Id.* at 550.

[61] *Id.* at 557.

. . . An agreement of the nature of this one which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker roads are completely destroyed and the survivor thereafter raises rates and maintains them.[62]

Since 1898 wholly new concepts of carrier regulation have progressively developed. More and more detailed regulation by the Commission has been substituted for the free and unregulated competition to which carriers were left by the philosophy of 1898. The "better way" has been found.

By section 4 of the Hepburn Act of 1906[63] the Commission was first given the very power to fix maximum rates which it did not have when the *Joint Traffic Association Case* was decided. That Act amended section 15 of the Interstate Commerce Act[64] so as to give the Commission express power to determine just and reasonable maximum rates and to establish through routes and maximum joint rates, to prescribe divisions of joint rates and the terms and conditions under which such through routes shall be operated. And section 5 of the Act of 1906[65] further amended the Act so as to give the Commission the power to award rate damages or reparation, in the first instance, with provision for enforcement of such award by court action by any person for whose benefit such award was made.

Since the Act of 1906, every legislative step has been in the direction of more complete and exclusive authority of the Commission over railroads.

The Act of June 18, 1910, known as the Mann-Elkins Act,[66] first gave the Commission power to suspend rates. The Transportation Act of 1920[67] first gave the Commission power to fix minimum rates. And the latter Act wrote into the law a wholly new national transportation policy.

That new national transportation policy was first analyzed and described by Chief Justice Taft in *Wisconsin Railroad Commission v. Chicago, B. & Q. Railroad Company,*[68] sustaining a state-wide order of the Commission requiring the raising of intrastate rates above the level fixed by the state commission, to prevent discrimination against interstate and foreign commerce.

The new policy sought to develop and preserve a national transportation system, and to that end sought to protect weak railroads against the very unrestricted competition which, in 1898, the Government and the Court recognized might enable the strong railroads to destroy the weak ones. And in the *New England Divisions Case*[69] the Court gave effect to that new policy by sustaining exercise by the Commission of its power over divisions of rates to take from the strong and give to the weak.

[62] *Id.* at 577.
[63] 34 Stat. 589 (1906), 49 U. S. C. §15 (1940).
[64] 24 Stat. 384 (1887), as amended, 49 U. S. C. §15 (1940).
[65] 34 Stat. 590 (1906), 49 U. S. C. §16 (1940).
[66] 36 Stat. 551 (1910), 49 U. S. C. §15 (1940).
[67] 41 Stat. 484 (1920), 49 U. S. C. §15(1) (1940).
[68] 257 U. S. 563 (1922).
[69] 261 U. S. 184 (1923).

And referring to those two cases, the Court in *Dayton-Goose Creek Railway v. United States,* sustaining an order of the Commission requiring surrender of excess profits under the recapture clause, said, through the Chief Justice:

> In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.[70]

That new transportation policy was recognized in *Railroad Commission v. Southern Pacific Company*[71] in connection with the power and duty of the Commission to control new investments, construction and extensions, as applied to the building of a new union station.

It was recognized in connection with the Commission's power over extensions and abandonment of lines in *Texas & P. Railway Company v. Gulf, C. & S. F. Railway Company,*[72] and in *Piedmont & Northern Railway Company v. Interstate Commerce Commission.*[73]

Since that initial effort at reshaping regulation of railroads to "ensure . . adequate transportation service,"[74] Congress has extended Federal regulation in connection with other forms of transportation and has elaborated more fully the objectives to be achieved by its legislation.[75]

The Transportation Act of 1940 carried this new policy farther, gave it a new, express definition as the "National Transportation Policy," and extended it to water carriers as well as to highway motor carriers and railroads.

That Act begins with the declaration of that policy, which states as its purposes, *inter alia:*

> . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust dis-

[70] 263 U. S. 456, 478 (1924).
[71] 264 U. S. 331 (1924).
[72] 270 U. S. 266, 277, 278 (1926).
[73] 286 U. S. 299, 311 (1932).
[74] The New England Divisions Case, 261 U. S. 184, 189 (1923).
[75] Air Commerce Act of 1926, 44 STAT. 568 (1926), as amended, 49 U. S. C. §171 *et seq.* (1940); Air Mail Act of 1934, 48 STAT. 933 (1934), as amended, 39 U. S. C. §463 *et seq.* (1940); Air Mail Act of 1935, 49 STAT. 614 (1935), 39 U. S. C. §469 *et seq.* (1940); Civil Aeronautics Act of 1938, 52 STAT. 973 (1938), 49 U. S. C. §401 *et seq.* (1940); Motor Carrier Act of 1935, 49 STAT. 543 (1935), 49 U S. C. §301 *et seq.* (1940); and compare Title II of the Transportation Act of 1940, 54 STAT. 898, 929 (1940), 49 U. S. C. §901 *et seq.* (1940); see McLean Trucking Co. v. United States, 321 U. S. 67, 81-82 (1944).

criminations, undue preferences or advantages, *or unfair or destructive competitive practices;* . . .[76]

No longer is the harsh Sherman Act rule of free and unregulated competition left applicable; "unfair or destructive competitive practices" are expressly forbidden.

That declaration of the "National Transportation Policy" ends:

. . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.[77]

The inevitable result of this wholly new regulatory policy, with its complete departure from the unrestrained and unregulated competition philosophy of the Sherman Act, is that the Court now holds: "Certain then it is that the Anti-trust Laws are inapplicable in all their apparent breadth to carriers by rail or water,"[78] and that "in the case of combinations of common carriers the Sherman Law is qualified by the Interstate Commerce Act, . . . and, in the case of shipping combinations, by the Merchant Marine Act."[79]

In the *McLean Trucking Company* case[80] the Supreme Court affirmed a judgment of a statutory district court of three judges refusing to set aside orders of the Commission authorizing consolidation of seven large motor carriers. The Department of Justice, as a part of its campaign against the Commission, and as it has so often done in recent years,[81] rushed in to confess error in the Commission's orders and to seek to overturn them, instead of defending them in accordance with its traditional duty. It argued that the Commission had failed to give due weight to the prohibitions and policies of the antitrust laws. The argument in its full sweep was rejected by the Court as being an attack upon the national transportation policy declared by Congress. "But," said the Court, "taken for less than that, it poses a problem of accommodation of the Transportation Act and the anti-trust legislation, to which we now turn. In doing so we note that the former is the later in time and constitutes not only a more recent but a more specific expression of policy."[82]

The Court in that case pointed out that "the national transportation policy is the product of a long history of trial and error by Congress in attempting to regulate the nation's transportation facilities beginning with the Interstate Commerce Act of 1887."[83] It traced much of that history, especially that beginning with the Trans-

[76] 54 Stat. 899 (1940), 49 U. S. C., note preceding §1 (1940). (Emphasis supplied.)

[77] *Ibid.*

[78] Terminal Warehouse Co. v. Pennsylvania R.R., 297 U. S. 500, 514 (1936), reaffirmed in Georgia v. Pennsylvania R.R., 324 U. S. 439, 453 (1945).

[79] Tigner v. Texas, 310 U. S. 141, 148 (1940), and cases there cited.

[80] McLean Trucking Co. v. United States, 321 U. S. 67 (1944).

[81] Associated Transport, Inc.—Control & Consolidation, 38 M. C. C. 137 (1942); Interstate Commerce Commission v. City of Jersey City, 322 U. S. 503 (1944); American Trucking Associations v. United States, 56 Fed. Supp. 394 (1944); Interstate Commerce Commission v. Mechling, 67 Sup. Ct. 894 (1947).

[82] McLean Trucking Co. v. United States, cited *supra*, note 80, at 79.

[83] *Id.* at 80.

portation Act of 1920, which it said "marked a sharp change in the policy and objectives embodied in those efforts,"[84] and ending in the Transportation Act of 1940. Of that history the Court said:

> The history of the development of the special national transportation policy suggests, quite apart from the explicit provision of sec. 5(11), that the policies of the anti-trust laws determine "the public interest" in railroad regulation only in a qualified way. And the altered emphasis in railroad legislation on achieving an adequate, efficient, and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business . . . has its counterpart in motor carrier policy.[85]

The Interstate Commerce Act, as amended, makes it mandatory for railroads to consult, confer, agree, and take joint action, by requiring them to make joint rates and joint routes. For the reasons pointed out so cogently by Mr. Eastman, they can carry out these mandatory duties only by the conference and rate-bureau method of arriving at the agreements required.

The campaign by the Department of Justice to subject the conference and bureau method of rate making to the prohibitions of the antitrust laws is an attack at the heart of the system of regulation and the national transportation policy which Congress has set up in the public interest. It is a direct attack upon the Interstate Commerce Commission. It is directly against the public interest as determined by Congress.

VI

CONCLUSION

Neither the *Georgia* case nor the Lincoln, Nebraska, case has been decided on the merits. The decision by the Supreme Court in the *Georgia* case on April 23, 1945,[86] merely held that the Court had original jurisdiction to allow the filing of a bill charging that certain carriers had coerced and controlled others in establishing discriminatory rates and that such coercion and control, if proved, would violate the antitrust laws.

As pointed out earlier in this paper, the only rate discrimination of which Georgia complained in that case has subsequently been completely wiped out by the Commission in the *Class Rate* case, and by the affirmance by the Supreme Court of the orders in that case. The basis of Georgia's case in so far as the interterritorial rate structure is concerned seems now entirely moot. Whether the *Georgia* case remains open for a decision on coercion and control and for an injunction, if they be found to have existed, remains to be seen. It seems plain, however, that any injunction based on such a finding would be a new kind of injunction of only academic import because confessedly the Court cannot, by injunction, reach and regulate the rates. The Court itself still holds that rate regulation as such is exclusively the function of

[84] *Ibid.*
[85] *Id.* at 83.
[86] 324 U. S. 439 (1945).

the Commission, having been committed to it by Congress for the defense of the public interest.

The Interstate Commerce Commission sometimes makes mistakes, just as do the courts, Congress, and all human institutions. But that Commission, with its long history, has established a reputation for fairness, due process, non-political and judicial attitude, and for expertness in its field unequalled by any other quasi-judicial, administrative body.

It is unquestionably in the public interest for that Commission to continue its regulation of the freight rate structure under the national transportation policy declared by Congress. The public interest would be destroyed and chaos would be produced by turning that regulation over to the doctrinaires of the Department of Justice to administer under the philosophy of unbridled competition embodied in the antitrust laws.

INTERTERRITORIAL FREIGHT RATES AND THE PACIFIC COAST

STUART DAGGETT*

It is, of course, a mistake to regard the interterritorial rate problem as the exclusive possession of any single part of the United States. As a matter of fact, there is an interregional rate situation wherever two homogeneous economic units establish or seek to establish relations of exchange which require the movement of passengers and goods. The relations between southern and official territories may illustrate such conditions, but they present only one instance out of many. The southern-official case may not even be as clear-cut an example of interterritorial exchange as are some others, because the units concerned lack homogeneity. One suspects that interterritorial rates may exist on shipments between districts all of which are subject to southern or official or western classification, and it may even be, since so-called territorial boundaries do not always coincide with the limits of economic regions, that shipments from one classification or rate territory to another, as from southern to official or western, should sometimes be regarded as intraregional rather than as interregional in character in spite of local patriotisms or formal nomenclatures that may be used. It is desirable to call attention to these elementary facts because so much attention has been paid to relations between northeastern manufacturing communities and states south of the Ohio River, although no useful purpose would be served by elaborating upon the distinctions made.

One important region in the United States, outside of official and southern classification territories, is known as south Pacific Coast territory. This includes California and, for some purposes, parts of New Mexico, Arizona, and Nevada. It is part of the larger region of the Pacific Coast which, in turn, is a segment of mountain-Pacific territory as shown upon rate maps. Of these areas, mountain-Pacific territory presents difficulties in analysis because it contains two great segments, west and east of the Sierras, that have little in common one with the other, either from the economic or the cultural point of view. The Pacific Coast, however, is definitely a "region" or "territory" in almost any sense in which it is desirable to use these terms. It is large enough to be significant; in 1940 the states of Washington, Oregon, and California had within their boundaries 11 per cent of the land surface of the continental United States excluding Alaska, and 7 per cent of the national population. Since 1940 its percentage of the population has increased. In spite of a considerable range of products, some of which can be found elsewhere,

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it has a degree of homogeneity of type of production and a marked self-consciousness, due in part to the successful cultivation and processing of certain agricultural materials and in part to geographical remoteness from the great centers of population in the East. These are sufficient characteristics for purposes of classification.

Assuming the fact that the Pacific Coast is a suitable unit for railroad rate analysis, the writer selects the transcontinental rate structure applied to the south coast and enlarges upon economic conditions in this subdistrict rather than upon rates and conditions in the north coast and south coast combined. This is because recent detailed studies are available that bear upon these rates and upon this more restricted territory. The effect will be to neglect some important problems such as those related to north coast lumber, wheat, and fruit. There is, however, no lack of rate questions in which the south coast is interested, and the striking features of transcontinental rates may appear as clearly in a study based upon south coast experience as in a report which rests upon a broader foundation.

The characteristics of the south Pacific Coast as an economic area are the following:

In the first place, the inhabitants are principally engaged in supplying and exchanging with each other goods and services which can be locally produced. The author has amused himself in estimating the relative importance of local effort in a community such as that of California, which is generally regarded as a state with specialized agriculture devoted to sales in a national market. Without dwelling upon the details of calculations which necessarily involve estimates, he is inclined to believe that 75 to 80 per cent of the efforts of the California population result in the production of goods and services which are consumed within the state. The principal reason for this predominance of local labor is that the number of persons employed in the service groups in this as in any modern community is relatively large. In California, in 1941, out of a labor force of approximately two and one-half million persons, about one million were employed in rendering personal and professional services, in operating local transport, in supplying each other with gas, electricity, and water, in building, in providing telephone facilities (mostly for local use), and in other work primarily of local concern. Of the remainder, some 440,000 were employed in retail trade. Besides the categories of service and local trade, a large part of the labor force in manufacturing, in agriculture, and in rail-air-water transport, in wholesale trade, and in banking and finance necessarily served the local inhabitants. Similar conditions can probably be found in other regions.

But in the second place, and in spite of the degree of self-sufficiency which has just been described, the south Pacific Coast has important connections with other districts. If this were not the case, of course, the south coast would not be concerned, as it is, with interterritorial rates. The nature and extent of these trade connections is generally known, but a few statistics will make the situation clear.

The following table sets forth the number of tons of revenue freight originated and terminated in California in the year 1945:

TABLE 1

TONS OF REVENUE FREIGHT ORIGINATED AND TONS TERMINATED IN CARLOADS BY CLASSES OF COMMODITIES, CALIFORNIA—CLASS I STEAM RAILWAYS. CALENDAR YEAR 1945[1]

Commodity Group	NUMBER OF TONS OF REVENUE FREIGHT	
	Originated	Terminated
Products of agriculture	9,312,552	6,680,166
Animals and products	723,777	1,707,069
Products of mines	11,418,777	13,105,498
Products of forests	3,355,924	5,399,346
Manufactures and miscellaneous	20,016,837	29,393,336
Total	44,827,867	56,285,415

It appears from the foregoing figures that California originated, in 1945, more carloads of agricultural products than were unloaded within the state and that it unloaded more animals and lumber products (mostly from adjacent areas) and more manufactured goods than it sent out. Corresponding figures from Washington and Oregon also show a balance of imports of manufactures, although the distribution of other items differs from that in California.

There is nothing particularly new or striking in the facts presented in the preceding table, except that the tonnage preponderance of westbound movements in an area which should show a tonnage balance of exports properly causes some alarm. With all due allowance for other factors, westbound preponderance indicates a purchasing power in the West which is swollen by government expenditures and may lack permanence. Apart from this, statistics present the familiar picture of a community which enriches its local consumption by adding a variety of eastern products to the goods and services that it can itself supply. But the extent of this exchange and the effect which it produces upon the entire economy of California and, indeed, upon that of the entire Pacific Coast, focuses attention upon the transportation upon which this interregional trade depends.

Further examination of available statistics, supplemented by more general studies, carries the inquiry some steps further. The products of agriculture which California and the south Pacific Coast export are principally fruits and vegetables grown and processed on the Coast, wine, and sugar imported from Hawaii and the Philippines. In many cases the California output is a principal source of supply for consumers of the entire nation, as well as a source of purchasing power for the state itself. The variety of identifiable articles is large, but oranges, grapes, lettuce, canned fruit, dried fruits and vegetables, sugar, and wine are suggestive names. Westbound, the principal movements are of steel and manufactures of steel, including automobiles and trucks, and machinery. Clothing and dry goods, beverages, tin articles, wine, and canned vegetables are among the remaining imports. Westbound shipments include

[1] INTERSTATE COMMERCE COMMISSION, BUREAU OF TRANSPORT ECONOMICS AND STATISTICS, STATEMENT NO. M-550 (SCS) CALENDAR YEAR 1945.

more types of goods than are sent eastward, but the volume of each category is small compared to the concentration of outbound movements.

The Bureau of Economics and Statistics of the Interstate Commerce Commission prepared data for use in connection with the *Class Rate Investigation*,[2] based upon carrier reports for May 27 and September 23, 1942, which suggest the distribution of railroad carloads moving between mountain-Pacific territory and specified territories of origin and destination. These figures of exports are not limited to movements from the Pacific Coast, but they may be used in the present discussion because the production of certain articles and hence their point of origin within mountain-Pacific territory may safely be assumed to have been for the most part in the coastal states. The following table presents the conclusions which the Bureau of Economics and Statistics reached in its report with respect to eastbound shipments:

TABLE 2

PERCENTAGE DISTRIBUTION OF COMMODITY CARLOAD SHIPMENTS FROM MOUNTAIN-PACIFIC TERRITORY BY TERRITORY OF DESTINATION. MAY 27 AND SEPTEMBER 23, 1942[3]

Article	PERCENTAGE ORIGINATING IN MOUNTAIN-PACIFIC TERRITORY AND CONSIGNED TO:					
	Mountain-Pacific Territory	Western Trunk-Line Territory	South-western Territory	Southern Territory	Official Territory	Canada and Mexico
Citrus fruits	9.946	13.979	7.527	6.586	50.403	11.559
Other fresh fruits	20.222	14.111	3.556	3.111	54.333	4.667
Fresh vegetables other than potatoes	16.912	17.647	9.375	4.228	44.485	7.353
Dried fruits and vegetables	28.997	17.073	4.065	11.382	32.792	5.691
Sugar	45.238	18.651	5.556	5.952	24.603	.....
Beverages	68.116	4.348	2.898	4.348	20.290	.....
Canned food	49.088	7.664	4.197	4.379	34.672	.....

A table similar to that just presented and from the same source shows the distribution of railroad carloads shipped to mountain-Pacific territory by territory of origin. The warning should be repeated that the information here given covers more articles than those shipped to the Pacific Coast. The statistics are, nevertheless, informative.

It appears from the data presented to the Interstate Commerce Commission and made part of the record in Docket No. 28,300 that from 20 to 54 per cent of a group of selected articles which were shipped from mountain-Pacific territory on two days in 1942 terminated their movements in official territory, from 4 to 18 per cent in

[2] Docket No. 28,300, 262 I.C.C. 447 (1945).

[3] INTERSTATE COMMERCE COMMISSION, BUREAU OF TRANSPORT ECONOMICS AND STATISTICS, TERRITORIAL MOVEMENT OF CARLOAD FREIGHT—MAY 27 AND SEPT. 23, 1942 (Exhibit No. 194, Docket No. 28,300, Class Rate Investigation) 18 (1943). According to the Interstate Commerce Commission, 65 per cent of California citrus fruit shipments, 80 per cent of the deciduous fruit, and 75 per cent of its melons and fresh vegetables terminated, in 1945, in official territory. *Ex parte* No. 162, Increased Railway Rates, Fares, and Charges, 1946, and *Ex parte* No. 148, Increased Railway Rates, Fares, and Charges, 1942, 266 I.C.C. 537, 563 (1946).

TABLE 3

PERCENTAGE DISTRIBUTION OF COMMODITY CARLOAD SHIPMENTS TO MOUNTAIN-PACIFIC TERRITORY BY TERRITORY OF ORIGIN. MAY 27 AND SEPTEMBER 23, 1942[4]

Article	PERCENTAGE TERMINATING IN MOUNTAIN PACIFIC TERRITORY ORIGINATING IN:				
	Mountain-Pacific Territory	Western Trunk-Line Territory	South-western Territory	Southern Territory	Official Territory
Iron and steel, 5th class.....	13.177	6.946	1.124	3.166	75.587
Machinery and boilers.....	13.218	6.035	1.149	2.299	77.299
Autos, trucks, and parts.....	25.516	5.629	1.313	5.253	62.289
Beverages.....	48.621	11.724	.345	8.276	31.034
Fabrics, bagging and bags.....	12.195	4.878	2.439	63.415	17.073
Manufactures and miscellaneous, n.o.s.....	47.771	6.560	2.131	4.317	39.221

western trunk-line territory, and from 3 to 11 per cent in southern territory. On the westbound movements tabulated above, from 39 to 80 per cent originated in official and southern territories. Mountain-Pacific territory depended less on official territory as a market than does the South for all articles covered by the report of the Bureau of Economics and Statistics of the Interstate Commerce Commission in 1942, but the difference was not striking in the case of products of agriculture, including Pacific Coast specialties referred to in the text; nor did the South draw a substantially larger proportion of its imports from official territory than did mountain-Pacific buyers when it came to manufactured goods. Currents of trade in both instances are attracted by concentrations of population and industry north of the Ohio and east of the Mississippi and Missouri rivers; the effect of these relations upon rate structures is, however, even greater in the West because of the degree of separation between eastern cities and the Pacific Coast.

What are the peculiarities of the transcontinental rate structure under which shipments move between the Pacific Coast and eastern points?

A first peculiarity is certainly that significant transcontinental rates are commodity, and not class, rates. The course which controversy has taken in the discussion of southern-official tariffs has unduly emphasized class-rate practice, although the decision in the *Class Rate Investigation* of 1939 did refer briefly to commodity rates also. But in transcontinental business class rates are admittedly unimportant. It is true that class tariffs do quote rates on articles exchanged between the eastern and the Pacific states. Such class rates are, however, so high that they are rarely used, and then only in special and supplementary ways.

The following table shows class and commodity rates in force between California termini and selected eastern cities before the general revisions authorized in 1945 and 1946:

[4] BUREAU OF TRANSPORT ECONOMICS AND STATISTICS, *op. cit. supra*, note 3, at 42.

TABLE 4

COMPARISON OF CLASS AND COMMODITY RATES BETWEEN CALIFORNIA TERMINI AND EASTERN POINTS OF ORIGIN OF DESTINATION[5]
(Rates are in cents per 100 pounds)

Commodity	Point of Origin or Destination	Class (Carload)	Class Rate	Commodity Rate
EASTBOUND				
Oranges	New York	3	438	135
Grapes	New York	3	438	150
Lettuce	New York	A	317	184
Canned fruits	Cleveland	5	305	96
Wine	New York	4	372	99
Dried fruits and vegetables	St. Louis	5	271	121
Sugar	Chicago	5	284	70
WESTBOUND				
Automobile bodies	Detroit	A	300	176
Beverages (beer)	Milwaukee	5	284	99
Canned vegetables	Chicago	5	284	88
Clothing	New York	2	528	307
Dry goods	Boston	1	611	206
Fertilizers	Nashville	E	122	75
Tin articles	Chicago	5	284	77
Steel articles	Chicago	5	284	110
Vehicles	Detroit	1	578	450
Wine	Buffalo	4	363	182

The difference between class rates and commodity rates in transcontinental movements is so great that it is obviously uneconomical to use the former when a commodity rate is available. This means that class rates, for most purposes, can be neglected. On the other hand, it is true that class rates are important historically, and that even today the zone boundaries set in class tariffs are often used in commodity rate construction. These rates cannot, entirely, be ignored.

A second statement which will throw light upon the transcontinental rate system is that through rates are quoted to and from terminal zones upon the Pacific Coast and not to and from single terminal cities. The practice of terminal ratemaking is of long standing. It is not, however, always understood that the relative position of western terminal and intermediate points has been, in the course of time, reversed. Originally, western termini were points at which water competition was encountered; and the rates to and from termini were usually lower than the rates to and from intermediate points. A terminal town had, therefore, an advantage over an interior city. Today, the rates to and from intermediate points on transcontinental hauls cannot be more, except in special cases, than the terminal rate, but they can be less. It may, accordingly, be to the advantage of a city to break away from the

[5] STUART DAGGETT and J. P. CARTER, THE STRUCTURE OF TRANSCONTINENTAL RAILROAD RATES 29 (1947).

terminal system so as to obtain, independently, lower rates. The present terminal area in south Pacific Coast territory includes most shipping points in California when class rates are involved. For commodity shipments the zone is broadened to include portions of Nevada, Utah, New Mexico, and Arizona. The eastern boundaries of the zones vary with the commodities which are moved.

More important today than the practice of western terminal grouping is the fact that eastern points of origin and destination are also grouped in zones, often stretching from the Canadian border at the north to the Gulf of Mexico at the south, and ranging in breadth from a comparatively narrow band to distances which include the greater part of the United States. For citrus shipments, a rate zone of 131 cents per hundred pounds included, before the recent revisions, the southeastern states, except Florida, and a large portion of the Mississippi River and the Missouri River basins, while a 135-cent rate was applied to the Northeast. The variation in charges in these sections did not exceed five cents over an extreme distance of two thousand miles. In fixing rates on eastbound wine, a single rate of 99 cents per hundred pounds was charged, irrespective of distance, to all points east of Salt Lake City and the eastern border of California. Zones on westbound shipments are also large. Thus for canned goods a rate of 88 cents was until recently applied from the entire central portion of the United States, and also from steamship piers at New York, Philadelphia, and Baltimore. States in the southeast paid 96 cents, while most or all of Virginia, West Virginia, Maryland, Delaware, Pennsylvania, New York, and New England paid 102 cents.

If one were to select any single feature of the transcontinental rate structure by which to characterize the whole, this would probably be the practice of zoning. Westbound, the practice encourages decentralization of industry in the East to the degree in which it places alternative sources of supply upon the same freight-cost level in serving the Pacific Coast. This is especially evident in the case of steel. Standard group outlines in this instance are distorted in order to establish identical rates from Birmingham and from Chicago. Dry goods and clothing tariffs apply the same rate from southern as from New England mills, and the canned goods group covers, as has been pointed out, the entire central portion of the United States. These are illustrations only, but they call attention to the effects of zoning in equalizing the position of competitive producing points.

Eastbound, the use of zones in the Pacific area has little discernible effect in scattering production. But the grouping of points of destination in the central, southern, and eastern states is convenient to shippers and carriers for two reasons. The first reason is that grouping promotes competition between parallel transcontinental lines by enabling northern routes to supply southern cities and southern routes to supply northern cities without encountering the prohibitions of section 4 of the Interstate Commerce Act.[6] The second reason is that the existence of zones simplifies diversion privileges which shippers have found useful in the routing of their

[6] 24 STAT. 380 (1887), as amended, 49 U. S. C. §4 (1940).

freight. Both subjects could be developed at some length, but not usefully for the subject now in hand.

Interregional rates between the Pacific Coast and eastern points evidently present problems of construction which have not attracted attention in the southern-official controversy. It is also clear that some questions which arise in that debate are not important in considering transcontinental rates. Shippers on the Pacific Coast are little interested in the relation of class to commodity rates and in determining the proportion of overhead which should be borne by either category. Such differences are insignificant in a system in which 98 per cent of the traffic moves upon a commodity basis. They are, likewise, only slightly concerned with problems of transition between classification territories, because most tariffs which they use quote through rates from origin to destination, and in these tariffs the addition to the total rate is small for movements in the eastern and southern states. Pacific Coast and southern shippers and consumers are, however, all interested in the level of rates and in their progression with distance. Any discussion of western rates must take these matters into account.

Characteristically in the transcontinental rate structure, eastbound commodity rates rise rapidly after shipments leave California during the first eight or nine hundred miles; after this, goods pass over a series of broad rate plateaus at successively higher levels until they reach a maximum elevation, varying with the commodity, beyond which no further increase occurs. In the case of sugar the rate from Crockett, California, to Chicago is actually less than that to some destinations west of the Mississippi River because of water competition, principally from Gulf cities. The details of profiles upon westbound movements are not available to the author, but from Chicago west the pattern is not too different from that which prevails eastbound.

Speaking still of eastbound rates, the level of charges on transcontinental shipments is more responsive to competition than to cost. Eastbound rates are low for the longer distances, in spite of the fact that movements consist mostly of perishables. They are low because of the importance of the traffic to the railroads, the elaborate organization of producers, market competition, and the general understanding that a high level of charges will reduce eastern sales.

Westbound transcontinental movements are principally of manufactured goods from official classification territory. Discussion of their levels is difficult, because of the great variety of shipments. It is clear, however, that local rates on the Pacific Coast are low—even lower, for instance, than rates for short distances (200 to 300 miles) out of Chicago. This is because of active motor-truck competition over an excellent highway system. Water competition between San Francisco and Los Angeles and between both cities and destinations in the Northwest contributes to the control of local charges. On middle-distance hauls, the rates are not particularly low except in special cases; but, at least, a recent survey based upon samples indicates

that the meeting points of eastbound and westbound rates on manufactured goods are not far from the geographical centers of the routes involved.

The following parties are concerned with transcontinental rates:

First, there are the consumers upon the Pacific Coast;

Second, there is a western farming community. This, to a greater degree than such communities in some other areas, is dependent upon outside markets;

Third, there is a commercial and distributing interest which has long served as an intermediary between East and West;

Fourth, there is a manufacturing organization, already considerable and anxious to expand;

Fifth, there are transportation agencies—rail, motor, and water—which should be developed or which, in any event, should be maintained, although the relative importance of these agencies may vary from time to time;

Sixth, there are distributors, producers, and consumers in other states. These have a legitimate interest in California and a right to be considered in any policy which the National Government may be asked to approve.

These are the people to be served. The general question is how to set up a railroad rate system which will best accommodate them all. There should be agreement upon details if possible and, in any event, upon principles which should be applied. Let us arrange our discussion, for a while, around some principles and policies which are discussed.

How far shall transcontinental carriers adjust their rates to the necessities of shippers who seek to sell in eastern markets? It may be assumed that eastern consumers approve this practice. Generally speaking, Californians also desire as low rates on eastbound movements as can be obtained, although they have sometimes objected in particular cases. Thus in *Rickert Rice Mills, Inc. v. Abilene & Southern Railway*,[7] millers in Arkansas, Louisiana, and Texas asked for reductions in the rates on rough rice from California; but opposing California interests objected to rates which would enable eastern millers to buy California rice in competition with millers in California. This is certainly an exception, for California growers and producers generally wish eastbound rates to be low, if this is possible, for the sufficient reason that low rates are likely to enlarge sales and to increase growers' net returns, both by increasing consumption and by displacing other sources of supply.

It may be, nevertheless, that shippers of California products eastbound will be forced, during the next few years, to oppose increases in transcontinental rates rather than to demand decreases, and this for several reasons.

One minor reason is that public attention has been directed to the advantages, real or alleged, of mileage rates. Shippers are conscious that legislation has been introduced into Congress calling for class and commodity scales to be universally applied in all parts of the United States. They doubt if such scales will be suited to their needs. Certainly, ordinary scales would price Pacific Coast commodities out of eastern markets.

[7] 248 I.C.C. 427 (1942).

In addition to the threat of legislation, there is a tendency in public discussion to emphasize the extra cost of railroad transportation in western territory and there is at least a chance that this may affect transcontinental rates.

Studies by the Board of Investigation and Research conclude that the full distributed costs of carrying railroad carload freight for three hundred miles are higher in mountain-Pacific than in any other of the freight rate territories except New England, for loads of twenty-five tons (box cars) and thirty tons (gondola and hopper cars).[8] Similar comparisons for hauls of 100, 300, and 500 miles in the *Class Rate Investigation* report of 1945, based on computations for 1939, showed higher full distributed costs in western territory (southwestern, western trunk-line, mountain-Pacific, northern Illinois and southern Missouri) than in any other part of the United States, although out-of-pocket costs based upon actual average loading were lower than in the East, including New England.[9]

Comparisons of this sort may form the basis of an attack upon the present moderate scale of eastbound rates.[10] The attack, when it is made, will be supported by groups in the South and East which compete with California products, and by intercoastal and Mississippi River carriers. This, together with other influences which may affect eastbound rates, causes California shippers some concern.

How far shall transcontinental carriers adjust their rates so as to encourage the growth of domestic industry upon the Pacific Coast? This is a type of problem which has caused most controversy in the South.

For the encouragement of local manufacturing industry one or both of two things are necessary. It is important to create and maintain a favorable relationship between rates on finished products from California manufacturing centers to markets on the Pacific Coast and in the mountain states, and rates on similar products from eastern points to these same destinations. The relationship should, probably, be one of preference and not only of equality because of certain advantages upon which eastern manufacturers can depend. It is important, too, to secure a favorable relationship between the rates on raw or slightly processed materials and those on highly processed imports. If such relationships can be safeguarded, western manufactures will be able to develop at more than a normal rate.

The present adjustment of railroad charges, while not obviously burdensome to the local western manufacturer, can probably be improved for the purposes mentioned in the preceding paragraph. Complaint is made, for example, of transit

[8] INTERSTATE COMMERCE COMMISSION, BOARD OF INVESTIGATION AND RESEARCH, REPORT ON INTERTERRITORIAL FREIGHT RATES, 1943, H. R. DOC. No. 303, 78th Cong., 1st Sess. 257 (1943).

[9] Class Rate Investigation, 1939, 262 I.C.C. 447, 576-577 (1945).

[10] The particular comparisons referred to in the text are probably impertinent because they are based upon too short an average haul. Not only this, but elevations and low densities of traffic which transcontinental railroads encounter do not certainly raise costs or, at least, do not increase them as much as the casual observer might suppose. Elevation itself is not an obstacle to transport, but only the cost of attaining elevation; and low density need not imply imperfect utilization of facilities or be reflected in high cost if the railroad which handles the traffic is built upon a scale appropriate to the volume of traffic which it actually secures. These conditions generally characterize transcontinental movements. They reduce the cost of railroad operation, as western interests hope to show.

arrangements which bring Birmingham steel into Arizona at effective rates considerably below the charges published for traffic originating at Birmingham. The details of these practices, as developed in hearings before the Temporary National Economic Committee in 1939, make interesting reading. It was apparently possible at the time of the hearings for a Birmingham steel manufacturer who desired to sell fabricated steel at Phoenix, Arizona, to buy steel in Birmingham at the Chicago price, with stipulation that the steel so bought should originate at a Chicago mill. The material so acquired could be shipped from Chicago to Phoenix via Birmingham, with the privilege of fabrication in transit at Birmingham. Having obtained possession, the Birmingham mill could process the imported steel or an equivalent amount of local steel, and could then forward the completed article to Phoenix at the remaining portion of the through rate from Chicago to Phoenix. This remaining portion would be substantially less than the published rate for a consignment of the same commodity produced at Birmingham from steel originating at that point without transit substitution. Los Angeles complained that, in consequence, a Birmingham fabricator twenty-two hundred miles from Phoenix could deliver his product in the latter city at a total landed cost of $267.75, whereas the cost to a Los Angeles fabricator, 395 miles away, would be $308.50.[11]

The transit situation, in its effect upon Los Angeles and Birmingham, may be regarded as an abuse of a current practice which is producing unexpected results. The opposition to the introduction of processed goods into Pacific Coast markets is not limited to instances of this sort.

In *Soya Bean Meal to Pacific Coast Ports*,[12] a case which will be referred to later in another connection, producers and distributors of cottonseed meal and cake in California, Arizona, and New Mexico objected to rate reductions on soya meal cake from points of origin in the Middle West.

Likewise, in *Hormel & Company v. Atchison, Topeka and Santa Fe Railway*,[13] Pacific Coast handlers opposed reductions in transcontinental rates on fresh pork and packinghouse products. This dispute illustrates the interest which California processors take in the relationship between railroad charges on raw products and those on processed goods. California obtains her cattle and sheep from nearby sources, but her slaughtering industry depends for something like half of its supply of hogs upon importations from the Middle West. Whether these animals will arrive alive or in pieces depends upon the comparative rates upon hogs, on the one hand, and upon fresh meats and packinghouse products on the other. If rates on live hogs are low and rates on products are high, then animals will be slaughtered upon the Pacific Coast. If the relationship is reversed, Pacific Coast handlers will meet severe competition. It appears that the relation between hog rates and product rates was, until 1945, distinctly favorable to California. To take one illustration, the rate on fresh

[11] *Hearings before the Temporary National Economic Committee*, Part 20, 76th Cong., 2d Sess. 10916-10917 (1939).
[12] 215 I.C.C. 291 (1936), 225 I.C.C. 51 (1937), 231 I.C.C. 411 (1939).
[13] 263 I.C.C. 9 (1945).

meat from Omaha to Los Angeles was about 249 per cent, and that on packinghouse products was 191.7 per cent, of the rate on hogs; whereas from Omaha to New York the percentages were 136 and 99.7. Packers in the Midwest asserted that they were being frozen out of the California market. The Commission agreed that traffic was not moving freely, due to the high level of the rates which were assailed. For this and other reasons, the Interstate Commerce Commission reduced rates on fresh meats and packinghouse products. The old rates from Omaha to Los Angeles had been 249 and 197.5 cents; the new rates between the same two points were made 156 and 130.[14] The decision was highly distasteful to the Pacific Coast.[15]

Probably the most important problem in California in which transcontinental rates on manufactured goods play a part is that in which the rates on steel and products of steel are involved. We have already seen that, in the exchanges between California and the East, the largest import into California consists of manufactures and miscellaneous commodities. Within this category a principal movement or group of movements consists of steel and of products made of steel.

The greatest volume of shipments comes in by water, but Interstate Commerce Commission figures show a large balance of tons by railroad terminating in California as compared with tonnage originating in that state.

In spite of heavy imports, a considerable local steel industry grew up in California before World War II, largely based upon scrap and imported sheets, plates, bars, pipe, and other semi-processed raw material. During World War II this industry greatly expanded in the West, principally at Geneva, Utah, and at Fontana, California, and local supplies of iron ore and coal were developed for its use. Whether this new expansion will maintain itself will depend principally upon its ability to dominate the local market to the exclusion or partial exclusion of eastern imports and, in the second place, upon the possibility of developing steel exports either to other countries or to other parts of the United States. In realizing its opportunities California must depend, in part, upon adequate railroad service and upon favorable railroad rates. Favorable, in this sense, means that rail rates on steel products must be relatively low outbound and that corresponding rates on westbound movements must be relatively high. Similar difficulties have been experienced by manufacturing industries in other parts of the country. The peculiarity of the California situation is that the demand is for the stabilization of an existing industry, not for the creation of something new.

There is a third question to be considered in discussing transcontinental railroad

[14] Hormel & Co. v. Atchison, T. & S. F. Ry., 263 I.C.C. 9, 50, 57, 58, 63 (1945).

[15] Complainants in the Hormel case compared westbound rates on fresh meats and packinghouse products with eastbound rates on fresh fruits and vegetables. In reply to a contention that low rates on fruits and vegetables from the Pacific Coast to the Midwest were depressed because of market competition to aid the Pacific Coast in marketing its surplus crops in the East, complainants stated that midwestern meats and packinghouse products were also subject to market competition, that there was a surplus of those products in the Midwest, and that midwestern meat shippers were just as much entitled to the benefits of competition of this kind as were California fruit growers. Hormel & Co. v. Atchison, T. & S. F. Ry., cited *supra*, note 14, at 51.

rates: should the railroad rate structure between East and West be shaped to meet the needs of intercoastal and Mississippi River water lines? Historically, of course, the relation of transcontinental rail and water carriage has been competitive, and recent controversies show that pressure still exists. The pressure of water competition upon the rates of western railroad carriers is felt in three ways.

In the first place, coastwise water movements along the Pacific Coast limit the amounts which railroad lines can charge between south coast ports such as San Francisco or Los Angeles and cities on the Columbia River and Puget Sound. This traffic is not, strictly speaking, interritorial, but it is interesting to observe that the Interstate Commerce Commission accepts the fact of water carriage in the coastal area as a sufficient reason for exempting the railroads along the coast, with stated limitations, from the prescriptions of section 4.[16]

In the second place, rail carriers have to deal, in transcontinental traffic to and from the Middle West, with competition from a combined barge-ocean or rail-barge-ocean route, using the facilities of the Mississippi River and of steamships plying between Gulf ports and the Pacific Coast. This competition is important.

In *Wire Rods Westbound to Pacific Coast*,[17] the record showed that the joint rail-barge-ocean rate from Chicago to San Francisco was $14.83 per ton as compared with a straight rail charge of $22.85. The water service was inferior, but not notably so. In spite of the opposition of certain intercoastal water carriers and of New Orleans, the railroad obtained permission to quote a rate of $14.30.

In *Soya Bean Meal to Pacific Coast Ports*,[18] rail carriers were permitted to reduce their rates from 76.5 to 60 cents. The water rate by rail-barge-ocean from Illinois was 55 cents—a rate fixed by competition with shipments from the Orient. Rail rates to points intermediate between Illinois and the Pacific Coast were not changed by this decision except when combinations on the ports resulted in lowered charges. Permission for relief from section 4 was granted in spite of the opposition of producers and distributors of cottonseed cake and meal in California, and the Southwest.

In *Sugar from California to Chicago*,[19] rail carriers were authorized to reduce rates to meet the competition of the ocean-barge route between the Pacific Coast and Chicago. Because of this competition all-rail shipments from San Francisco Bay points to destinations in the Middle West, including Chicago, had fallen from 109,370 tons in 1929 to 32,803 tons in 1933, while all-water or water-and-rail business had increased from 37,147 tons to 137,291 tons. The maximum all-water charge from San Francisco via New Orleans to Chicago was 54.99 cents. Rail rates to Chicago were 65 cents. Rail carriers offered to reduce their rates to 48 cents (minimum 80,000 pounds) and 53 cents (minimum 60,000 pounds). The Interstate Commerce Commission authorized rates of 60 and 65 cents, with permission to lower to 50

[16] Pacific Coast Fourth Section Applications, 129 I.C.C. 3 (1927), 165 I.C.C. 373 (1930), 190 I.C.C. 273 (1932).
[17] 214 I.C.C. 561 (1936).
[18] 215 I.C.C. 291 (1936), 225 I.C.C. 51 (1937), 231 I.C.C. 411 (1939).
[19] 211 I.C.C. 239 (1935).

cents if water rates should be still further reduced. Carriers were released from the limitations of section 4.

The third type of water competition to which transcontinental rail carriers have been subject is that supplied by the intercoastal lines. This is, for traffic between the Atlantic and Pacific seaboards, the most effective water opposition which railroad lines encounter, and it is also the best-known. Estimates made in 1944 are to the effect that railroads carry only 45 per cent of the total business between the Pacific Coast and ports in Atlantic and Gulf states; almost all of the remainder moves by water. General familiarity with the rivalry between intercoastal and railroad lines makes it possible to pass this subject with two references.

In the *Southern Pacific Transcontinental Cases*[20] the Southern Pacific Railroad proposed reductions on a list of eastbound and westbound commodities over the Sunset-Gulf route which averaged 44 per cent. Westbound, the reductions included a shrinkage in the rates on iron and steel bars from 109 cents to 42.5 cents; on canned goods from 106 cents to 57.5 cents; and on chocolate from 160 cents to 113 cents. Eastbound, the rate on beans was lowered from 105 cents to 56 cents, and that on canneds goods from 105 cents to 52.5 cents. These reductions were intended to reestablish a rail movement which, to and from California terminals, had declined from a total of 2,732 tons in 1925 to 924 tons in 1928. Reductions were not to apply to intermediate points. The proposals were not, however, approved.

Attention may also be called to *Transcontinental Westbound Automobile Rates*[21] because, in this case, the railroads proposed a general formula governing the relation of transcontinental and intermediate rates on the assumption that relief from section 4 could be obtained. The rates in force on automobiles from groups C and D to California ports were, when the case was brought, $4.65 and $4.50. The carriers proposed to reduce these rates to $3.82 or even, in some contingencies, to a considerably lower level. They then suggested that rates to western points intermediate to California terminals should be constructed by adding to the rate for the nearest terminal 75 per cent of the lowest interstate rate from such terminal to the intermediate destination, with rates to terminals actually in effect before the case was brought to be observed as maxima. The rail-water rates from interior manufacturing points to the California ports were constructed by combining the rail rate to the Atlantic seaboard and the proportional steamship rates from the Atlantic ports by way of the Panama Canal to the Pacific Coast. The proposed rail rates to California ports were obtained by adding to this sum an amount of thirty cents to offset port and terminal charges, insurance, other expenses incidental to handling by rail, and the recognized superior value of all-rail over rail-and-water service. The Interstate Commerce Commission did not approve the application, so that the proposed relationships were not set up.

Rail and water carriers have always competed, but at the present moment they

[20] 182 I.C.C. 770 (1932).
[21] 209 I.C.C. 549 (1935).

would be glad to modify the intensity of transcontinental competition for the reason that railroads and water lines alike feel the need of higher rates. As a matter of fact, the water lines are taking the initiative in proposing that the level of transcontinental rail rates be changed. This is because of wage and price increases and the uncertainties of future traffic. It will be recalled that railroads requested authority to increase their charges throughout the United States in 1946, and that they received permission to do so in *Ex parte 162*.[22] At the moment, the United States Maritime Commission, which is about to withdraw from its emergency operation of coastwise and intercoastal lines, has become convinced that private water carriers will not be able to cover costs after its withdrawal without an increase in shipping rates, and that a condition of this increase will be a reworking of railroad tariffs. The Maritime Commission has persuaded the Interstate Commerce Commission to undertake a comprehensive investigation of railroad rates, which are alleged to be so depressed as to prevent shipping lines from operating profitably without government support. The railroads seem willing to accommodate the water lines generally, if not in detail, but on condition that the relation of rail and water rates remains unchanged and on the further condition that increases will not jeopardize transcontinental movements by the encouragement of other sources of supply. The limitations are not acceptable to the water lines, and an order fixing minimum rail rates is desired.

Water carriers have not yet opened their case before the Interstate Commerce Commission, but there is little doubt that it will include several propositions.

The first of these will be that the Interstate Commerce Commission should modify a rail rate structure which, in intercoastal and coastal commerce, makes water transport impossible.

This contention is based upon the preamble to the Interstate Commerce Act as amended in 1940. The language of this preamble permits the argument that the present transcontinental rate structure does not "foster sound economic conditions in transportation" because it threatens to eliminate a low-cost carrier, that the structure constitutes an "unfair or destructive competitive practice," and that transcontinental rates interfere with the end of "developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."[23] The language quoted may be interpreted to mean that the Interstate Commerce Commission should, when necessary, cause railroad rates to be raised to a level which will enable water lines to participate in traffic between the Pacific and Atlantic coasts.

The argument on the other side is that the Interstate Commerce Act directs the Commission to foster both rail and water transportation. It contains no mandate that common carriers by water are to be accorded preferential treatment.[24] The

[22] 264 I.C.C. 695 (1946), 266 I.C.C. 537 (1946).
[23] 54 STAT. 899 (1940), 49 U. S. C., note preceding §1 (1940).
[24] Soya Bean Meal to Pacific Coast Ports, 225 I.C.C. 51, 57 (1937).

Interstate Commerce Commission, it is said, may not require one carrier or group of carriers to maintain rates for the purpose of protecting the traffic of others.[25] This view is reinforced by reference to sections 15a, 216(i) and 307(f) of the Interstate Commerce Act, which direct the Commission, in fixing rates, to "give due consideration, among other factors, to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed."[26] Land carriers point out that it is permissible for railroads to meet water competition[27] and assert that reduction of rates does not constitute an unfair or destructive competitive practice,[28] although the Commission may step in, in extreme cases.[29] These observations suggest, though they do not fully describe, a line of discussion that will probably appear.

A second contention of the water carriers is that transcontinental railroad rates, or some of them, are exceptionally low because of past conditions of water competition. The argument is that water competition is no longer effective and that water-depressed rail rates should, accordingly, be raised. It is true that the Interstate Commerce Act forbids rail carriers to increase their charges under such circumstances,[30] but it has been held that this prohibition must be construed in the light of other sections of the Act.[31]

There seems to be no real legal difficulty which should prevent rail carriers from raising present rates. It is not so clear that they can be compelled to do so unless the low rates produce a discrimination forbidden by sections 2, 3, or 4 of the Interstate Commerce Act[32] or unless they are unreasonable under other sections of the law.

This leads us to the insistence by water carriers that transcontinental rail rates are unreasonably low. In elaborating this argument the shipping lines presented a formula to the Interstate Commerce Commission in January, 1947, based upon the assumption that reasonable transcontinental rates today are the rates approved by the Commission in 1945, increased by an allowance for special conditions in mountain-Pacific territory and by allowances for subsequent increases in wages and material costs. Unfortunately, the calculations and the more obvious criticisms must be relegated to a note below.[33] We may hazard the opinion, however, that the Commission

[25] Seatrain Lines, Inc. v. Akron, C. & Y. Ry., 243 I.C.C. 199, 214 (1940).

[26] 48 STAT. 220 (1933), as amended, 49 U. S. C. §15(a) (1940); 49 STAT. 560 (1935), as amended, 49 U. S. C. §316(i) (1940); 54 STAT. 938 (1940), 49 U. S. C. §907(f) (1940). See Chicago, B. & Q. R.R. v. United States, 60 F. Supp. 580 (E. D. Ky. 1945)

[27] Grain and Grain Products to Florida, 197 I.C.C. 441 (1933); Glass from Southwestern Points to Mobile, Ala., 246 I.C.C. 315 (1941).

[28] Rubber Products between Southern & Ohio Points, 41 M.C.C. 93 (1942).

[29] Morgain Forwarding Co., Pick Up and Storage, 258 I.C.C. 771 (1944).

[30] 36 STAT. 548 (1940), 49 U. S. C. §4, par. 2 (1940).

[31] In the Matter of Reopening Fourth Section Applications, 40 I.C.C. 35, 40 (1916).

[32] 24 STAT. 379 (1887), as amended, 49 U. S. C. §2 (1940); 24 STAT. 380 (1887), as amended, 49 U. S. C. §3 (1940); 24 STAT. 380 (1887), as amended, 49 U. S. C. §4 (1940).

[33] The shipping lines reasoned that the class scale prescribed by the Interstate Commerce Commission in the *Class Rate Investigation*, 262 I.C.C. 447, 766 (1945), should be accepted as a statement of "reasonable" rates at the time the Commission's decision was handed down. Starting with this basic scale, the following operations were proposed:

1. The basic class scale of 1945 should be extended beyond its limit of 2500 miles to whatever

will not be much impressed by this or by any other formula, but that it will give general consideration to the cost of transcontinental movements in order to determine the "compensatory" character of the rates which are involved. Once the Commission has embarked upon this inquiry, the case is likely to follow familiar lines. The simplest position is that railroad rates are "non-compensatory" when they do not cover "over-all" or "fully distributed" costs. More elaborately, and because it is not certain that the transcontinental rate structure can be asked to bear such costs, it may be argued that transcontinental rates do not provide revenue to meet (a) full operating costs, exclusive of a fair return on the fair value of railroad property, or (b) added costs, or the difference between total period costs when a given shipment is undertaken and total costs without that shipment.

It should be possible, in the approaching proceedings, to obtain some fair judgment as to what transcontinental rail costs in the various categories may be. It should be possible also—and this will be interesting—to ascertain whether intercoastal water carriers or railroad lines now operate at the lower cost, due allowance being made for differences in quality of service. The past assumption has been that the water lines are cheaper, but it is by no means certain that this is still the case. A recognized procedure, when the foregoing facts have been ascertained, would be to fix minimum rates for the low-cost carrier sufficient to cover fully distributed costs and to permit the other carrier to meet this minimum so long as its added costs are provided by the price. This would settle the question as between the rail and water carriers involved, although the water carriers have less flexibility than the railroads and might find it difficult to operate if they were declared to be the more expensive agency. It would not, however, satisfy shippers, and it might easily disrupt patterns of charges which are of considerable importance to producers and consumers in the United States.

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distances might be necessary in transcontinental rate-making;

2. The basic scale, so extended, should be increased by 12½ per cent for such portions of the transcontinental haul as lay within mountain-Pacific territory (1200 miles);

3. The amended scale should be further increased by 22½ per cent on the authority of the Interstate Commerce Commission's decision in *Ex parte* No. 162, *Increased Railway Rates, Fares, and Charges*, 266 I.C.C. 537 (1946);

4. Commodity rates should be derived from the perfected class scale by consideration of the approved relationships between class and commodity charges;

5. The Commission should prescribe the commodity rates so calculated as minima below which railroads should not be permitted to go.

There are obvious objections to the formula just described. For one thing, the proposal would eliminate the broad groups which are now a characteristic of transcontinental railroad rates and would disturb existing competitive relations to which eastern and western shippers have adjusted themselves, with effects upon the flow of traffic which can hardly be foreseen. A second weakness in the plan is that it assumes a similarity between the costs of transcontinental hauls and the general costs of movement in mountain-Pacific territory which has not been established and probably cannot be established. Again, the proposal undertakes to ascertain and to use approved relationships between class and commodity rates. It is true that the Interstate Commerce Commission has referred to such relationships in considering rates upon specific commodities; but these relationships are not fixed for all commodities; they vary with differing lengths of haul and operating conditions, and they are, of course, affected by competition. It is hardly possible to determine the level or form of particularized commodity rate structures by assimilation with a general class-rate structure. The Commission is highly unlikely to attempt this practice at so late a date.

The preceding discussion makes it evident enough that interregional structures are not erected solely for the entertainment of persons in southern and official classification territories. These structures create problems in the Far West as in the Far East, and one set of complexities may be as hard to disentangle as the other. Certainly the West is interested in interregional rates, because railroad rates condition exchange between the Pacific Coast and other areas, and exchange with other territories permits specialization, raises the level of productivity, and improves the standard of living of the inhabitants.

California differs from the states south of the Ohio and Potomac in that the average income of her inhabitants is high. In 1945 this income was $1,480 per capita, contrasted with an average of $761 in the Southeast and a low of $556 in Mississippi, and exceeded only by the per capita income of $1,595 reported for the state of New York. Nor was this the outcome of the war, for as far back as 1929 the California per capita income was still greater than that in any other state or district except New York, New Jersey, and the District of Columbia. This high per capita income is the result of many causes, but it is evidence that the specialized commercial agriculture of the state has yielded, on the whole, a profitable return.

The transcontinental rate system was devised to bring the products of California agriculture to market in competition with other sources of supply: hence the low rates on long hauls, the extensive grouping, the diversion privileges, and the other features which the present article has discussed. The test of this structure has been its ability, along with other factors, to produce the results described. There has been no dispute with reference to the technique of crossing territorial boundaries, for most trancontinental rates have been through rates to destination. There has been no demand for "destination" bases of rate making, because local rates in California have compared favorably with those in eastern states. And, until recent years, there has been no critical comparison of eastbound and westbound rates, nor any desire to change the fundamental structure of the state's economy, except for normal ambitions of local industry to take advantage of the purchasing power of the state. The chief rate controversies on the Pacific Coast, on the contrary, have grown out of the desire of interior producing areas to share in the advantages provided by the favorable location of the Pacific termini. This does not mean that the rate structure has been ideal, but only that disputes have for the most part dealt with adjustments and corrections.

The interterritorial rate problem which now confronts California is no longer, however, one of detail. It arises out of several facts or tendencies. One of these is a rising level of transport costs, first felt by the carriers and then reflected in the level of transport rates. An increase in eastbound rates, and especially a percentage increase, affects remote areas of supply such as California more than it does areas which are near the market which they serve. This is why Florida supported a percentage increase in railroad rates in 1946 while other interests favored a flat increase or an increase subject to a maximum. The Interstate Commerce Commission then

recognized the difficulties of the Pacific Coast by introducing maxima to limit rate advances on some, though not on all, commodities. Increased railroad charges are normally shifted to some extent, and are borne, in varying degrees, by carriers, producers, and consumers of the goods. Some impairment of the position of California has, nevertheless, occurred.

A second fact which threatens to affect California arises out of changes in the intercoastal shipping situation. It is not yet possible to predict how far the cost of maintaining a domestic merchant marine will be imposed on the producers and consumers of the Pacific Coast. To the extent that it is so imposed, the balance of California production will be disturbed.

These two circumstances relate, most importantly, to California agriculture. Meanwhile, a postwar employment condition has appeared in the West which lends urgency to the question of industrial development mentioned in the earlier discussion of railroad rates. This condition was not caused by transport deficiencies and cannot, perhaps, be cured by readjustment of tariff charges; but it is certain that the transcontinental rate structure is involved. To summarize the situation briefly, more than a million and a half people migrated to California after 1940. These migrants, along with large imports of capital, made possible a dramatic enlargement of western shipbuilding and aircraft industries, although not all migrants were employed in those industries. The building of aircraft and of ships fell off when the war closed. California now finds herself overequipped and overstaffed in the manufacturing field. While some of the new supply of men and material can be employed in agriculture and service, it does not seem likely that immediate unemployment can be prevented unless industry is enlarged. There is an echo here of difficulties which confront the South, although the timing and the fundamental situation are not the same. Hitherto, in considering manufactures and railroad rates on manufactures, it has been possible to argue reasonably that low westbound rates on manufactures tend to increase the real income of coastal communities by reducing the total cost at which processed articles can be obtained. They are, therefore, generally desirable. But this is now contrasted with the fact that low westbound rates encourage importations which interfere with domestic industry and so prevent the utilization of surpluses which cannot otherwise be employed. This strengthens the position of local manufacturers, who assert that the sum of transport costs to all markets which local industry can reasonably expect to reach should in principle be no greater than the sum of transport costs payable by outside competitors. When production costs are relatively high, local manufacturers even ask for an equalization of advantage by manipulation of the rate.

California manufacturers are no more and no less idealistic than manufacturers elsewhere. As in the Old South, the best conditions for them are those which most increase their sales. But from a more general point of view, opportunities for the rapid growth of manufactures in California appear to be of the following sorts:

[84] *Ex parte* No. 162, Increased Railway Rates, Fares, and Charges, 1946, 264 I.C.C. 695 (1946).

The first opportunity lies in the supply of local needs for goods and services which have always been locally produced. The importance of this opportunity may be suggested by the estimate made earlier in this paper that over 75 per cent of the efforts of the labor force in California were occupied, in 1940, in satisfying its own requirements. This outlet does not require that California producers shall exclude eastern manufacturers from access to local markets.

The second opportunity will be found in the specialization and improvement of certain types of manufactures so that these, as well as specified agricultural products, may form part of the exports from the state. In as much as the bulk of prewar exports was disposed of in the Mississippi Valley or at points east, this chance, if realized, will require an increase in long distance hauls, eastbound. If new markets, as in the Orient, can be found, the goods selected for export will be different from those which prewar conditions would suggest.

A third opportunity will be, to a degree, a mixture of the preceding two. If transportation and production conditions justify the practice, a larger proportion of the exchanges between California and other regions may take place between California and other mountain-Pacific states, thus reducing the total volume of transport and changing the character of California exports.

Still another possibility will be the substitution of local production for manufactures which have previously been imported from the East in exchange for agricultural exports. To the extent that this occurs, the outbound movements of agricultural commodities from California may be expected to be reduced.

For completeness, a fifth alternative may be mentioned. If the surplus labor and capital not engaged in self-maintenance in California are supplied with material and otherwise supported by imports, if their products are exported from the state, and if the difference in values between imports and exports is used for investment in other areas, then this surplus can function without effect upon the economy of the Pacific Coast.

Assuming a balanced economy and relatively stable rates on products of agriculture, it would seem that an increase in westbound rates on manufactures would tend to reduce the volume of westbound shipments and so occasion, in the long run, either a reduction in eastbound exports, an outward movement of capital, or an accumulation of purchasing power which might be expected to be reflected in an increase in the price level in the state. Ultimately a new balance would be reached, presumably less favorable than the old.

If we assume an unbalanced economy, with an excess of labor and capital which is unemployed, the effect of low westbound rates might be to make industrial employment of at least a portion of the surplus labor and capital highly difficult. High westbound rates, on the contrary, would permit new capital and labor to be turned directly to the production of articles formerly imported. If the rates were prohibitive, the complete replacement of imports by domestic production would not be impossible to achieve. A corollary would be the cessation of exports, for goods would

hardly be continuously exported from the territory when nothing was received in exchange. In the long run this would be desirable if the productivity of labor and capital in the isolated area, taking account of reductions in over-all costs of transport following isolation, were greater than before interregional shipments were cut off. It would be undesirable if this assumption should not represent the facts.

The importance of this type of analysis lies in the conclusion that a solution of the interregional rate problem, in so far as the Pacific Coast is concerned, requires a preliminary consideration of the organization of industry and agriculture which is most appropriate in the Far West. There is, actually, no reason to suppose that the ideal adjustment will be one which maximizes industry in this area any more than that it will be an adjustment which maximizes agriculture, while it is clear that simple equalization of western rate levels with charges in other parts of the country will lead nowhere, without regard to the effects which such an equalization will produce. The problem is highly complicated, and can best be summarized in the statement that interregional rates which discriminate against the Pacific Coast are rates which dislocate arrangements that are desirable from the point of view of the Pacific area. Only when the optimum organization of industry and agriculture has been determined can the best plan of rate charges be worked out. A reasonable assumption is that arrangements which facilitate interterritorial exchange will improve the quality of production and raise standards of living in the West; but it is logically possible that restrictions upon interchange, at some times and places, may lead to a superior result. A reasonable assumption, also, is that the optimum development of the Pacific Coast will contribute to the prosperity of other sections, although here, too, conflicts may exist. The relations of regions in the United States are cooperative as well as competitive, so that all may benefit in the long run from policies that strengthen the individual elements which, together, form a completed whole.

These remarks grow out of a study of transcontinental rates. They are, perhaps, pertinent to the treatment of interterritorial rates generally, wherever an interregional problem may appear.

A NATIONAL TRANSPORTATION POLICY

ROBERT R. YOUNG*

I

The National Transportation Policy is expressed in the Federal statutes, principally the Interstate Commerce Act and the several supplementary acts among which should be mentioned the Railway Labor Act, the Bankruptcy Act, the Panama Canal Act, and the Clayton Antitrust Act. The Civil Aeronautics Act applies to transportation by air. These Federal statutes embrace the policy of the Congress affecting transportation. The policy so defined must conform to the antitrust laws except in those instances where relief is given as in section 5(11) of the Interstate Commerce Act.[1]

The framework of the existing policy is the result of an evolutionary process. Congress has frequently amended the statutes. Many of these amendments have wrought far-reaching changes in the principles of regulation and the powers of the Commission. The Transportation Act of 1920 and the Transportation Act of 1940 both changed the regulatory process affecting the railroads. Appropriations by Congress for aid in highway construction, for the development of inland waterways, or for construction of airports may seriously affect the welfare of the railroads or other carriers. Those acts of Congress which provide such subsidies or tax differentials for any mode of transportation, after its development period is past, may be viewed as modifications of the National Transportation Policy or as exceptional incidents inconsistent with the policy. Congress is the master of the policy.

That part of the policy which affects the making of interterritorial freight rates and prohibits discrimination is as old as the Interstate Commerce Act. It is the duty of every railroad to establish reasonable through routes with other railroads and reasonable rates applicable thereto and to establish classifications and regulations. Unjust discrimination, undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, are prohibited. Thus, the law puts these duties on the carriers and imposes penalties for violations. Any person may complain to the Commission; that body has the duty of investigating the complaint and the power to prescribe relief.

Many complaints affecting interterritorial freight rates have been filed with the Commission, especially during the last twenty-five years, and the Commission has ordered many adjustments. Complaints related in most cases to the rates applicable to the movement of manufactured products from the South to the eastern or official

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[1] 24 STAT. 380 (1887), as amended, 49 U. S. C. §5(11) (1940).

territory. Upon its own motion, the Interstate Commerce Commission finally instituted a general investigation of existing class rate and classifications in 1939. In May, 1945, after long hearings, the Commission entered an order requiring the establishment of a uniform level of class rates and classifications throughout the entire United States east of the Rocky Mountains. Since it would take several more years to complete the required revisions, the Commission sought to give some measure of temporary relief by entering an interim order which reduced class rates by ten per cent in the South and West and interterritorially, and increased class rates within the East by the same percentage.[2] This order was enjoined on petition of several northern states and a large number of western railroads, but was upheld by the United States Supreme Court in May, 1947, after two years of litigation.[3] Slow motion appears to be the current strategy of those whose interests are contrary to the adjustment of rates.

Our transportation statutes provide penalties for violations of the law but intend that such violations shall not occur. The primary duty of dealing fairly with the public is imposed on the carriers. Good business policy demands that the patron shall be well and faithfully served. Progressive business institutions recognize that the customer is always right. The fact that so many complaints were filed and so many rate adjustments were ordered by the Commission, in the past two or three decades, strongly indicates that the railroads were not alive to the needs of commerce. They seem to have failed to adjust their prices to the developing requirements of their customers.

Common sense and business judgment support the presumption that complaints about rate discrimination arise from conditions that can be corrected with mutual benefit to the railroads and the public. There must have been underlying reasons for the chronic condition complained of by business interests in the South and the West. In view of the known relationships and close control exercised by the New York bankers over the railroads of those regions and over the industries in the East, the initiated can guess one underlying reason why rates were kept high in the South and West. The hidden cartel could protect the industries which the bankers already controlled in the East and attract new ones to that territory rather than to the South and the West. The ensuing pattern did not need to take the form of raising rates in the South and the West but could content itself with fostering reductions in the eastern rate structure as against lack of action elsewhere. It was to the interest of the New York bankers to promote and maintain any rate differential which resulted in favor of the East. In this aura of monopolistic intent, the presumption naturally arises that the controlling group was not concerned with developing rates appropriately adapted to the needs of commerce and industry except in the East. It is not surprising that recently the remedies provided by the antitrust laws have had to be invoked in rate matters rather than those available in the Interstate Commerce Act.

[2] Class Rate Investigation, 1939, 262 I.C.C. 447 (1945).
[3] See the FOREWORD to this symposium. [Ed.]

The general administration of this National Transportation Policy affecting carriers other than air carriers is delegated to the Interstate Commerce Commission. Certain duties and responsibilities for initial action are imposed on the railroads, and steps they take are generally subject to the review of the Commission.

In the Transportation Act of 1940, the Congress summarized National Transportation Policy as follows:

> To provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.[4]

Notably, the Congress did not cease with a statement of the end to be attained. It further provided that all the provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out this declaration of policy.

The Interstate Commerce Commission, sad to report, reaches a sixtieth birthday this year with its principal ward highly unprepared to meet the new transportation day of 1947. It is likewise a tragic commentary on the effective exercise of the Commission's powers and duties through sixty long years that, at this late date, a symposium can still be organized by Law and Contemporary Problems on interterritorial freight rate discrimination. This paper does not propose to present or discuss all our thoughts on the National Transportation Policy but to single out for analysis certain factors which nurture rate discrimination and to reveal why and how they do it.

All railroad problems, whether they be those today concerning rates and ratemaking, banker-controlled railroad policies, inadequate financial return, the emergence and importance of aviation, or the inequities of subsidy and taxation, call for thoughtful but decisive action. At such time, little can be gained by bemoaning the past and it is axiomatically fatal to follow the time-honored railroad practice of living in it. Progressive thought in the railroad industry does not belabor the Interstate Commerce Commission in these critical days to deter it but to awaken it to a proper exercise of its designated powers and activation of its assigned policy.

II

Hovering in the background of the charges and denials of interterritorial freight-rate discrimination is the small clique of eastern bankers that has dominated the railroad industry since its earliest days without a dollar of permanent ownership. Defenders of the status quo, it is natural that they would exert their financial power

[4] 54 Stat. 899, 49 U. S. C., note preceding §1 (1940).

to oppose expansion of industry in the South and West that would be detrimental to the long-established, banker-and-trustee-controlled industries of the North. Their plan for monopoly was the artificial protection of vested interests in one section of the country at the expense of the people as a whole. Control of the railroads brought large collateral advantages to the bankers in such forms as lucrative emoluments from financing services, stock transferships, paying agencies and trusteeships, power over vast amounts of bank deposits, and control over purchasing, salaries, jobs, fees for insurance, legal services, advertising, and auditing.

Even the depression of the Thirties, which forced into bankruptcy most of the ill-nurtured railroads of the South and West, could not dislodge the power of this ruling clique. It met the crisis head-on. This little group of bankers, with their nominees, through lightning change of costume, emerged as protective committees for the security holders to reorganize the railroads and relaunch them in sound condition. One of their new garbs was the voting trust. This odious device usurped the voting rights of the stockholders and vested complete control of the railroad, its directors, and its officers in the hands of trustees. When the Congress wrote legislation planning to abolish abusive power and privilege inherent in the offices of executives and directors,[5] it overlooked the fact that the voting trustee was their absolute master in the case of the bankrupt carrier.

The Interstate Commerce Commission, which has the duty to supply the daily ration of the carriers and maintain their health in normal times, should not likewise be charged with making the plan of rehabilitation after it has permitted a breakdown. The Commission is a bi-partisan body of eleven men appointed by the President and charged with the preservation of a sound transportation system. Although the term of each is seven years, tenure can be extended by reappointment for life. This naturally makes the Commissioners eager for continuance in office and keenly responsive to the influence of pressure groups.

The labor and shipping groups are well organized and outspoken in stating their demands to the Commission. The railroad security holders are not. A policy of liberal wages and negligible rates on the part of the Government can quiet labor and shippers but is of scant benefit to security holders. The two-pronged attack of labor and shippers brought on many railroad reorganizations which wiped out interest-paying debt and dividend-paying stock.

With the Interstate Commerce Commission's approval, the New York group swept away the property rights of the investor in exchange for voting trusts. The forfeiture which took place did not merely shift title from an equity holder to a creditor as in the case of a farm or home foreclosure. The senior holder was also scaled down in order that voting stocks might be received in exchange for non-voting bonds.

No doubt Wall Street was surprised at the eagerness with which Washington joined the scheme. The bankers were to continue in even tighter control than pre-

[5] Securities Exchange Act, 48 STAT. 881 (1934), 15 U. S. C. §78a *et seq.* (1940).

viously. Old stockholders were to disappear. The new ones created through the drastic dilution of bonded debt were to have no voice in the management of the company. This complete disenfranchisement of the owner was to occur even if the bondholders reduced or sold their holdings before the reorganization was completed, as has been done in many cases. Thus in the Thirties, 37 of our 135 Class I railroads, representing 25 per cent of total railroad mileage, went into bankruptcy. Many of these companies are still there after ten, twelve, and fifteen years in spite of the fact that they are now in a stronger cash and physical condition than many solvent carriers.

When a bill[6] to provide for a voluntary modification of the financial structure of railroads was introduced in Congress early in 1946 the following background of the problem was presented:

> The bill enables railroad companies to adjust their financial affairs quickly, economically, and on a business basis. . . .
>
> The existing law, section 77, was enacted in 1933 . . . in the belief that it would help railroads to correct their financial affairs. It was found to do the opposite. It has placed in the hands of Government officials extraordinary power. . . :
>
> (1) to demolish every part of the financial and corporate structures of those railroads;
>
> (2) to plan in every respect the financial and corporate future of those railroads;
>
> (3) to pick men to control those railroads; and
>
> (4) to decree the forfeiture of $2½ billion of investments.
>
> The present bill puts an end to every one of those powers and restores the operation of railroads to their managements. . . .[7]

The bill passed both houses by an overwhelming vote in the closing days of the last session only to be vetoed by the President.[8] True, the President said he believed the next Congress could formulate a better bill. This was small consolation to the victims who had fought an uphill fight for nine long years and were quite content with the bill as passed by Congress. The pressure of other matters may smother sentiment for a new bill in the present Congress and the President made no promises to urge such a bill. He likewise did not call upon the courts, the Interstate Commerce Commission, and other parties in interest to suspend progress of pending reorganization plans in spite of the following warning from the Senate Committee:

> The problem is pressing because if something is not done—and done quickly—two great wrongs which cannot be righted subsequently will have been carried to fruition:
>
> (a) the savings of hundreds of thousands of American families will have been irrevocably wiped out (in fact, $850,000,000[9] of such investments already have been wiped out beyond recall); and
>
> (b) an additional large part of the Nation's railroads will fall under control of a half dozen powerful New York financial institutions. . . .

[6] S. 1253, 79th Cong., 2d Sess. (1946).

[7] Sen. Rep. No. 1170 on S. 1253, 79th Cong., 2d Sess. 1-2 (1946).

[8] U. S. Code, Congressional Service, 79th Cong., 2d Sess. 1713-1714 (1946). See Insurance Group Committee v. Denver & R. G. W. R.R., 67 S. Ct. 583, 589 (1947).

[9] The amount was 1,080 million dollars at the time of the President's veto. Since then, it has been increased by 188 million dollars.

Forfeitures are taking place, or are contemplated, that have no basis in equity or moral right.[10]

The monopolization of railroad policy by this banker-Government alliance can be further shown over and over through the pattern of uniform action which it fostered. First there was the campaign of opposition to competitive bidding for railroad securities. When this plan was advocated, it appeared as though there were only two railroads in the country: one controlled by the Alleghany Corporation and the other by the House of Morgan. The Association of American Railroads appeared before the Commission representing all the railroads except the Chesapeake & Ohio Lines and urged that the bankers be kept in their position of preference. Such intervention of management against security holders was a gross violation of obligation.

Then again, about V-J Day a meeting was held in Washington by the railroads operating sleeping cars. They agreed to petition the District Court at Philadelphia for two years' delay in its decree in the *Pullman* antitrust case[11] for no apparent reason other than to enable the Pullman monopoly to enjoy two more years of high traffic earnings with old equipment. The nation's sleeping car plant had long since passed obsolescence and could not be rejuvenated for years. Its nearly seven thousand cars averaged about twenty-two years in age. If the railroads had an effective sales organization and up-to-date methods of promotion to tap the rail travel potential, they would need fourteen thousand new sleeping cars. If the railroads were then to keep pace with all modern improvements as developed, an annual replacement rate of about two thousand sleeping cars a year would be necessary. Yet, subsequent litigation brought rejection of offers for the Pullman business by independent, progressive bidders and a mere transfer of the old type of management to a railroad pool[12]—such is the power and luck of monopoly.

The pattern was also demonstrated by actions of the voting trustees of most of the bankrupt railroads. It took such forms as the hoarding of cash in favored banks and the failure to extinguish debt at a discount by open-market purchase.

Nowhere was there deviation from the monopoly pattern. Air conditioning in day coaches was discouraged by illegal agreements. Such lack of interest in modernization was a natural result of the failure to encourage competition in the manufacture of new equipment. A principal reason why we have not scratched the surface of the railroad travel potential has been the lack of attractive equipment and services. Railroad passenger traffic must comprise (1) speed, (2) frequency, (3) price, and (4) comfort and attractiveness, plus merchandising.

Probably the most patent indication of our monopoly pattern was presented by the complaint, filed by the Department of Justice in 1944 against the Western Association of Railway Executives (whose top committee meetings were held in Wall

[10] SEN. REP. No. 1170, cited supra, note 7, at 6-7.

[11] United States v. Pullman Co., 64 F. Supp. 108 (D. C. Pa. 1945), *aff'd by equally divided court*, 67 S. Ct. 1078 (1947).

[12] *Ibid.*

Street) and others,[13] alleging that their railroads had under *written* agreement, entered into in 1932, agreed (among other things):

(a) to impose upon shippers in the Western District freight rates which are higher than those fixed by defendants and their co-conspirators for comparable service to shippers in the Eastern District; . . .

(g) to deprive shippers of perishable products of competitive transportation rates and services by holding cars of perishables shipped from the Western District upon side or spur tracks in order to delay their delivery at eastern destinations; . . .

(l) to disconnect and place out of operation aircooling equipment on cars coming from connecting railroads which had installed such equipment;

(m) to prohibit the installation and provision of various recreational facilities, including motion pictures and radios, upon trains operated by defendant railroads;

(n) to refrain from solicitation of certain types of low-rate passenger traffic;

(o) to eliminate competition by restricting the individual railroad's right to advertise and solicit business.

Early in 1947, the Chesapeake & Ohio group of railroads withdrew from the Association of American Railroads in protest against some of the Association's practices. Subsequent to their resignation from the Association, our railroads have actively supported the formation of a new organization to represent the public, railroad security holders, railroad labor, railroad management, and financial institutions, as well as individuals interested in the progressive development of the American railroads. Named the Federation for Railway Progress, it will campaign actively for new equipment and improved services, for a balanced wage and rate structure, for progressive management, and for return of free enterprise to railroads.

The purpose of reviewing these monopolistic practices has been to show the reason why change in the present transportation structure is opposed by persons who control the destinies of the railroads today. So long as their emoluments continue and the Wall Street bankers succeed in perpetuating themselves in the industry, there is little likelihood of eliminating the inequities of which the shippers in the South and West complain. There must be an end to such combinations which restrain transportation services required by the law and the public interest.

III

The railroads receive an inadequate return on their investments and because of this are in constant danger, as they have insufficient reserves in the event of a business recession. They must, therefore, oppose rate reductions until legal discrimination is found to exist. Therefore, so long as general revenues from all sources are too low, we may not expect voluntary elimination of rates which are claimed to be unreasonable or discriminatory.

It is the aim of the National Transportation Policy, established in 1940, to set reasonable charges for transportation services with a view to developing, coordinating, and preserving our national transportation system. The Commission is directed to give proper consideration to the effect of rates on the movement of traffic; to the

[13] United States v. Association of American Railroads, 4 F. R. D. 510 (D. C. Nebr. 1945).

public need of adequate and efficient transportation service at the lowest cost consistent with the rendering of such service; and to the need of revenues adequate to permit the carriers under honest, economical, and efficient management to provide such service.

In determining the need of revenues sufficient to enable the carriers to provide adequate and efficient transportation service, one simple test which the Commission can apply is the relation of net railway operating income to the needs of the carriers for fixed charges and net income large enough to maintain credit. The need for Commission action would appear beyond question when the earnings of many important carriers are not enough to cover fixed charges. Another test, which in 1920 was prescribed by the Congress and has since been applied by the Commission, is the adequacy of the rate of return on the value of the property.

In April, 1946, carriers applied to the Commission for rate increases estimated to yield about 19 per cent in increased revenues. The Commission allowed certain small increases effective July 1, 1946.[14] Finally in December, it raised the July increases to 17.6 per cent and made them effective as of January 1, 1947.[15] In a report issued in February, 1947, the Commission stated that the net railway operating income for the year 1946 was 3.16 per cent of the approximate value of the railroads for rate-making purposes as set by the Commission as of January 1, 1945. However, when adjustment was made to eliminate unusual items from the 1946 income, consisting chiefly of about 170 million dollars in carry-back tax credits, the report stated that the net railway operating income was lowered to only 2.29 per cent of the valuation as of January 1, 1945.[16]

In the matter of the freight rate increases sought in 1946, the Commission made its first report in July and stated that the full amount of the increases proposed by the carriers, as an emergency measure, had not been shown to be reasonable and just. Accordingly, the Commission allowed an increase of only about six per cent in July, but it was able to see the need of this increase being raised to 17.6 per cent *just six months later*. The failure or refusal of the Commission to make effective July 1 the rate increases which it authorized as of January 1, 1947, undoubtedly had a far-reaching adverse effect upon the financial condition, the credit, and the services of the rail carriers.

Interesting contrasts can be discovered by comparing the financial condition of the railroads with other industries which the public interest has compelled the Government to regulate. From 1929 through 1945, the electric power and gas, and the telephone and telegraph industries, both regulated monopolies, earned an average of more than five per cent on net worth—on the book value of preferred and common stock plus surplus. During these same years, the railroads earned an average of only a little more than 2.5 per cent on their net worth.

[14] *Ex parte* 148 and 162, Increased Railway Rates, Fares, and Charges, 264 I.C.C. 695 (1946).

[15] *Ex parte* 148 and 162, Increased Railway Rates, Fares, and Charges, 266 I.C.C. 537 (1946).

[16] INTERSTATE COMMERCE COMMISSION, BUREAU OF TRANSPORT ECONOMICS AND STATISTICS, MONTHLY COMMENT ON TRANSPORTATION STATISTICS 4 (Feb. 13, 1947).

The railroad industry is not a monopoly but its rates and services are subject to review and regulation by the Government. What then is the reason for the unbalanced rate of return which exists as between these three industries? The prime factor is the dilatory and unrealistic process by which railroad rate regulation in relation to return on investment is determined and administered by the Commission. Too lengthy delays may determine at once whether the railroad industry will operate profitably or not. A rate of return on investment for an entire industry of only about 2.5 per cent is bound to be fatal to some of its members.

In amending the Interstate Commerce Act of 1920, the Congress certainly never intended that the return on the money invested should fall to a point where the national transportation system should be so weakened that the Government would have to take over and operate the railroads. Yet road after road has been forced into costly bankruptcy or trusteeship in the last fifteen years. It is most likely that with such a possibility in mind the Congress specifically set forth in the Act of 1920 that 5.5 to 6 per cent constitutes a fair and reasonable industry-wide return on the value of the property.

The property, material, and supplies of the railroads represented an investment of 20.5 billion dollars in 1920. The following year the railroads collected 5.5 billion dollars in revenues. After paying operating expenses and taxes, 601 million dollars of net railway operating income remained, or a return of 2.9 per cent on investment. During the twenty-five following years, the 20.5 billion dollar investment was increased to about 28 billion dollars. From this greater industry, the owners had reason to expect more work and larger returns.

In 1946 the industry did perform by far more work than in 1921. The railroads hauled 90 per cent more freight and carried 80 per cent more passengers. Revenues, however, were only 38 per cent greater despite the added investment and the handling of nearly twice as much traffic. Net railway operating income amounted to 619 million dollars in 1946 compared with 601 million dollars in 1921, or a return of 2.2 per cent on investment in 1946 against 2.9 per cent in the earlier year. In addition, over one-fourth of the net railway operating income reported for 1946 consisted of non-recurring tax credits. As a result, the railroad security holders' investment dollar really earned only 1.6 per cent in 1946 in spite of the heavy traffic carried. For the railroads to be restored as vital revenue-producing properties, a much more realistic rate of return is required.

IV

Competitive factors, always part of the practical aspect of rate-making, will have to be given even greater weight in the future. Consideration of these factors is a natural deterrent to uniformity in the railroad rate structure. Thus, the problem of removing discriminations which may be found will be further complicated by the fact that the Interstate Commerce Commission is no longer the absolute czar of transportation affairs in the United States. The fledgling airline industry of ten

years ago has, through the speed of war developments and the magnitude of war expenditures, quickly reached maturity and become an important component of our national transportation system. The Commission has absolutely no control over airline affairs nor the impact of airline affairs on the railroads or the other modes of transportation.

About 90 per cent of our inland transportation needs, both passenger and freight, were serviced by the railroads prior to 1920. Since that date there has been a renewed use of the inland and coastwise waterway system, together with increased utilization of the intercoastal waterway system through the Panama Canal, the passenger automobile, truck, bus, pipe line, and airplane. By 1940, the railroad portion of total commercial ton-miles in the United States, *excluding* substantial coastwise and intercoastal traffic, was reduced to 62 per cent. The railroad share of total passenger miles, *excluding* phenomenal private automobile traffic, was by coincidence down to about the same percentage. The nature and characteristics of coastwise, intercoastal, and passenger automobile traffic make it statistically unwise to include data on these media in the computation of total commercial traffic used for 1940. Were this possible, reduction in the railroad share of freight traffic would have been greater and of passenger traffic much greater. Just as the transportation problem today is no longer a railroad problem, no longer can it be assumed by the Interstate Commerce Commission and the Congress that railroad affairs "will straighten out somehow," because the virtual traffic monopoly of the railroads is definitely past.

The original Interstate Commerce Act of 1887 applied only to the railroads. Later, pipe line common carriers were made subject to regulation by the Interstate Commerce Commission.[17] From 1935 to 1942, the jurisdiction of the Commission was gradually extended to cover interstate operations of trucks and busses, domestic water carriers, and freight forwarders.[18] In 1938, the air carriers, however, were made subject to a new and separate regulatory body which is now known as the Civil Aeronautics Board.[19]

The declaration of National Transportation Policy contained in the Transportation Act of 1940, and quoted at the beginning of this article, appears to be deficient in at least one respect, in that it sidesteps the existence of the separately stated policy and separate regulatory body for aviation established by the Civil Aeronautics Act of 1938. The declaration of policy for air carriers appears in Title I, section 2 of this latter Act:

> In the exercise and performance of its powers and duties under this Chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—
>
> (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

[17] 24 STAT. 379 (1887), as amended, 49 U. S. C. §1(1) (1940).

[18] 49 STAT. 543 (1935), 49 U. S. C. §301 *et seq.* (1940); 54 STAT. 929, 49 U. S. C. §901 *et seq.* (1940); 56 STAT. 284 (1942), 49 U. S. C. A. §1001 *et seq.* (Supp. 1946).

[19] 52 STAT. 973 (1938), as amended, 49 U. S. C. §401 *et seq.* (1940).

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.[20]

A study of the policy passages of the Civil Aeronautics Act of 1938 and the Transportation Act of 1940 reveals general similarities. The statement of policy contained in the Civil Aeronautics Act, however, is unique for two reasons. In the first place, it directs the Civil Aeronautics Board (originally designated the Authority in the Act) to foster the development of air transportation, without any mention of consideration being given to the effect of such air development on the other forms of transportation. In the second place, it directs the Board not only to regulate air transportation but to *encourage* and *promote* its growth. No such emphasis on promotion is contained in the statutes with regard to the carriers under jurisdiction of the Interstate Commerce Commission, although the Commission is generally directed to foster sound economic conditions among the several carriers "all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail as well as other means." The phrase "as well as other means" should be noted. If it were meant to cover air transportation, it is far too vague to have any legal or practical effect.

The upshot of these two inconsistent statements of National Transportation Policy is that we have the Civil Aeronautics Board required to consider the development of aviation alone, and the Interstate Commerce Commission ordered to develop a complete national transportation system when it has no authority over air, which is now not only a principal component of such a system but the fastest developing one.

Infancy is an outmoded plea for the airlines today because they have long since grown beards and gone off to fight our wars admirably. In the summer of 1946, air passenger travel attained a rate of 7.5 billion passenger-miles per year, and air passenger revenues in August of that year amounted to 75 per cent of the railroad passenger revenue in Pullman cars. But when the Civil Aeronautics Act became law in 1938, air transportation was still on a small scale and the Congress was anxious to promote this new, high-speed medium in every possible way. With that in view, civil air carriers were singled out for Governmental financial aid far exceeding that ever enjoyed by any other American public utility or industry. The

[20] 52 Stat. 980 (1938), 49 U. S. C. §402 (1940).

key public-aid provision, which appears in Title IV, section 406(b) of the Act, reads, with italics supplied, as follows:

> In determining the rate in each case, the Board shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; *and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.*[21]

Rigid interpretation of this provision practically *insures* the solvency of every certificated airline which carries the United States mail. The provisions appear mandatory. The Board is required to set air mail pay at a level which, together with all other income, will maintain the carrier in business and provide revenues adequate to attract new capital as needed. This necessarily means a level which will yield a profit. If the Board errs therefore in fixing an air mail pay rate for the future which is too low, and a carrier consequently encounters financial difficulties, the carrier can go back to the Board for more mail pay. Upon proof of these facts and a showing that management of the carrier has been honest, economical and efficient, the Board seems compelled to grant increases for retroactive application. When the railroads must face this type of spoon-fed competition from "Baby Aviation," the least the Interstate Commerce Commission can do is to act speedily on their requests for increased passenger and freight rates designed to minimize imminent losses. Airlines recently received approval of an industry-wide passenger fare increase from the Civil Aeronautics Board in a few days.

V

Related to the inadequacy of the railroad revenues and the increased importance of competitive factors, notably those concerning air transportation, are the unbalanced subsidy and taxation policies of the Government in regard to the various modes of transportation. The over-all income of the railroads is thus effectively limited. This policy again creates a normal reaction on the part of railroad managements to oppose reduction of specific rates. The inequities worked through public subsidies and tax differentials form a principal virus threatening the health of our national transportation system today. While the nature and extent of public aid is invariably a complicated and controversial question, this does not mean that reasonable indications of it cannot be ascertained. All forms of transportation, except pipe lines, have received public assistance at some time in their history although there has been considerable variance in the kind and amounts.

[21] 52 STAT. 998 (1938), 49 U. S. C. §486 (1940).

Public aids to the railroads entirely benefited a common carrier system. Aids to the highways, waterways, and airways have benefited commercial users, but the facilities developed were also available for non-commercial use. The degrees to which the latter was true necessitate allocations of the total aid. This requires acts of judgment and accordingly lays the foundation for dispute.

Fortunately, one of the subjects on which the temporary Board of Investigation and Research, created by the Transportation Act of 1940, made a report was *Public Aids to Domestic Transportation*.[22] This report was issued in September, 1944, just as the Board expired, and contained much valuable information. There was also an earlier, but less meritorious, report, entitled *Public Aids to Transportation*, issued by the Federal Coordinator in 1940.[23] Both of these studies have supplied material for the discussion which follows.

Land grants, chiefly in the West and South, constituted the principal form of public aid to the railroads and were made to facilitate construction of lines in unsettled territories. The Board of Investigation and Research found that total land granted amounted to about 179 million acres, of which 73 per cent was contributed by the Federal Government and 27 per cent by nine individual states. Present Federal land-grant mileage is about 17,500, or approximately seven per cent of the total miles of railroad lines in the United States. The lands, largely conferred between 1850 and 1870, varied greatly in quality and potential value.

The value of this aid is a highly debated question. The Federal Coordinator concluded that the total net aid amounted to 1,443 million dollars, but this figure was based on intricate calculations much too inclusive and much broader than land-grant aids, the principal medium of railroad subsidy. The Board of Investigation and Research arrived at a figure of 495 million dollars for land-grant aid and the Bureau of Railway Economics at one of 148 million dollars. Disagreement in these two latter estimates centers largely around whether the amount of aid in monetary terms is properly measured by the net value which the railroads realized from the lands or by the value of the lands at the time of grant.

Regardless of the true figure, this aid to the railroads is generally held to have been a sound public investment because the beneficiary railroads agreed to rate reductions on mail, Government property, and Federal and military personnel. Competing railroads, which did not receive land grants, voluntarily equalized their rates with the land-grant roads in order to receive their share of the Government traffic. Coverage of the exemption was reduced to military freight and personnel in 1940.[24] The exemption was finally entirely abolished in October, 1946.[25] As of the end of 1945, calculations by the Bureau of Railway Economics indicated the savings to the Government were already well over one billion dollars.

[22] Board of Investigation and Research, Public Aids to Domestic Transportation, H. R. Doc. No. 452, 79th Cong., 1st Sess. (1945).

[23] U. S. Office of Federal Coordinator of Transportation, Public Aids to Transportation (1940).

[24] 54 Stat. 954 (1940), 49 U. S. C. A. §65 (Supp. 1946).

[25] 59 Stat. 606 (1946), 49 U. S. C. A. §65 (Supp. 1946).

An examination of the subsidy record for the railroads reveals therefore that historically they did not all finance their own way, but where this is true the debt has been repaid for the greater part. In addition, the railroads own and maintain their own rights of way and structures, which account for about 70 per cent of their investment, and pay *ad valorem* taxes on this property. Only the pipe lines pay similar taxes. Moreover, these taxes paid by the railroads are devoted to general governmental purposes—even to the extent of participating in subsidy contributions to their competitors.

Turning to public aids to highway transportation, the Board of Investigation and Research found an aggregate expenditure of 41 billion dollars by Federal and state agencies for highways, roads, and streets for the period 1921 through 1940. Of this total, about 15 billion dollars was spent on primary highways. Secondary roads accounted for another 13 billion dollars; town and city streets for a like amount. About 1931, Federal participation in the highway program increased sharply until it amounted to 36 per cent of total expenditures in 1938.

The extent to which highways have become financially self-sustaining has had varied interpretations. The Federal Coordinator's report of 1940 concluded that "motor vehicle users as a class have paid their way since 1927." The Board of Investigation and Research stated in 1944 that "a comparison of costs and road-use payments shows that in recent years the general class of motor vehicle users has contributed amounts fully adequate to meet an equitable share of the total annual economic costs of roads and streets." While the two reports are in accord that motor vehicles now generally pay a little more than their fair share of highway costs, the studies are not in agreement in one important respect.

The Federal Coordinator stated that the users of private automobiles (87 per cent of all motor vehicles in 1940) fell slightly short of paying their full share of highway costs and that the deficiency was met by overpayments from trucks and busses. The Board of Investigation and Research report, on the other hand, found four years later that the private automobiles pay more than their fair share and that most of the larger vehicles pay less.

A tabulation in the Board of Investigation and Research report of annual costs of all highways, roads, and streets chargeable to privately owned motor vehicles, compared with state and local highway user revenues, by types of vehicles, for the year 1940, was very revealing. It showed the *average* charge for all vehicles (automobiles, busses, and trucks) was $37.62 per vehicle for highway costs. Contributions in gasoline taxes and registration amounted to $39.82, or an excess payment of $2.20. The breakdown of the vehicles by *individual classes,* however, indicated that about the only class of vehicle which made an overpayment was the private passenger automobile, charged with $28.13 and contributing $33.31, or an excess of $5.18. The intercity busses, for example, were charged with $1,045.24 and paid only $765.57. Non-farm trucks with capacity of five tons or more were charged with $362.28 and paid only $260.62. Combination trucks (tractors with trailers) were charged with

$702.08 and paid only $429.15. Professor William J. Cunningham, writing in the *Harvard Business Review* last fall, concluded on analysis of these data in the tabulation of the Board of Investigation and Research that "the figures indicate that the busses and trucks competitive with railroads were subsidized, and that the subsidy was paid by the private automobiles."[26]

On the taxation side, the payments made by highway users in gasoline taxes, registration fees, drivers' licenses, and the like may not be clearly regarded as taxation. They are really charges for the use of publicly owned highways. Collections from these sources do not go into funds for the general expenses of government but are earmarked for highway construction, maintenance, policing, and other such expenses which bring a direct benefit only to the motor carriers. Furthermore, these user charges, as paid by the commercial motor carriers operating the heavier vehicles, do not compensate the Government fully for maintenance, amortization, and interest on the highway investment.

Even waterway proponents admit that domestic water carriers are subsidized. The Board of Investigation and Research found that the Federal Government made appropriations for improvements in rivers and harbors of 2,723 million dollars through the fiscal year 1940. An additional 443 million dollars was appropriated for lighthouses, beacons, and buoys. Over 80 per cent of these monies was made available after 1890. The figures do not include data on the New York State Barge Canal System or other substantial state and municipal aids.

All of this terrific outlay of public monies was, of course, not entirely for navigation, and the problem of joint costs is presented in matters of water transportation just as it is in the case of highway use. Apportionment, however, is a matter of small import in discussions of aids to domestic water carriers because the users pay nothing whatever to reimburse the Government for the navigation cost of the waterway projects. Traffic through the Panama Canal marks the single exception. Comparisons of cost of transportation by water, as against cost by the other modes of transportation, are therefore highly unfair because the hidden costs, which are borne by the taxpayers, are not revealed. Also, by any standard of equal taxation, water transport does not carry an equitable share of the tax burden. The tax bill on its vessel property is negligible.

Public aids to air carriers are on a scale of great magnitude and are of highly current interest. Subsidy to the airlines through public construction of the airports is only one medium through which they receive Government aid. They contribute only token sums for maintenance and use of the airports, have almost free use of the airways constructed, maintained, and operated by the Federal Government, are paid for carrying the mail on a "need" basis to insure sound finances, and do not bear their fair share of the tax burden.

So universal has become the practice of public construction of airports and air terminals that the airlines have come to assume that this constitutes a vested right, and

[26] Cunningham, *The Transportation Problem*, 25 Harv. Bus. Rev. 58, 72 (1946).

complacently expect the public to bear this burden, the most expensive part of the commercial aviation investment. In 1946, the Harvard Business School made an independent study of terminal airport financing and management. It states at the very beginning:

> The increasing size of airport costs makes the problem of airport management a major concern both for the owners of public airports and for those who use them. Within a comparatively few years the total investment in terminal-type airports may pass the $2 billion level. By then, the annual costs of operating such airports, currently estimated at $58 million (including interest and depreciation), will have become almost $200 million.
>
> The relative size of the prospective $200 million annual airport operating expense is emphasized by the fact that the reported assets of all domestic airlines as of mid-1945 were only $213 million, and total profits for 1945 were just under $34 million. Although these airlines are not the sole users of terminal-type airports, they do account directly or indirectly for the bulk of the present relatively small airport revenues.[27]

Through 1944, over one billion dollars of public funds was expended for civil airports in the United States, according to figures of the Civil Aeronautics Administration. Over three-quarters of the expenditure was for the larger terminal-type airports, the size and cost of which are for the most part determined by the needs of the commercial airlines, as distinct from the lesser requirements of private flyers.

In 1945, about 73 million dollars was spent on civil airports. The new Federal Airport Program for 1946-1953 calls for the expenditure of another billion dollars to be composed of two Federal and state-municipal shares of 500 million dollars each.

In addition, to cite a single instance, the city of New York has just turned over its airport development to the tax-exempt Port of New York Authority, which plans to raise at least another 100 million dollars over and above public contributions already made or contemplated for the city program. If this plan is consummated, railroads in the city of New York face about 300 million dollars of tax-free terminal competition constructed with public or quasi-public funds.

Maintenance of the airports used by airlines, including snow removal, lighting and repair of runways, and police and fire protection, is invariably paid for by the taxpayers of the local government sponsoring the airport. Airline operations usually take priority over private flying at the large terminal airports, so as to make impracticable any cost allocation based on proportional flight activities. Few cities keep accurate financial records of expenditures and costs at their airports. The taxpayers accordingly cannot ascertain the local operational subsidy given the airlines, but it is large.

The airlines make commercial use of the costly Federal airways practically free of charge except for their nominal user contributions through gasoline taxes. These airways are equipped with visual beacons and directional radio beams provided, maintained, and operated by the Federal Government. Continuous and specialized weather information is also provided gratuitously. Take-offs and landings of the commercial airliners are directed by Federal employees in the airport control towers.

[27] BOLLINGER, PASSEN, AND MCELFRESH, TERMINAL AIRPORT FINANCING AND MANAGEMENT 3 (1946).

The question of air-mail subsidy is also a complicated one. In recent years, the air-mail activities of the Post Office Department have paid their own way, but the proportionate profits which the Department has obtained from air mail, as against railroad mail, are very much out of line. If the new five-cent air-mail rate had applied to the actual air-mail poundage carried in fiscal year 1945, the Post Office Department would have realized a profit of only 2.7 cents per pound as against 37.9 cents per pound at the three-cent rate by surface transport. This would have meant a reduction in profit of 35.2 cents or 93 per cent for every pound of first-class mail transferred from surface to air transport.

The Post Office Department is dependent on the profits of first-class mail to meet the deficits of other classes of mail and special services. To the extent that profit on first-class mail is reduced, the finances of the Post Office Department suffer proportionately. In fiscal year 1946, the Post Office Department paid the airlines about 27 million dollars for transporting approximately 24 million pounds of air mail. The railroads were paid 22 million dollars for transporting and providing distributing facilities for around 387 million pounds of non-local first-class mail. To put it another way, the railroads handled 94 per cent of the total non-local first-class mail by weight but received five million dollars less than the airlines received for carrying six per cent of the total weight. The diversion of substantial volumes of mail from the railroads to the airlines, while profitable to the airlines, is certainly detrimental to the the revenue of the Post Office Department and the railroads.

What the public pays for stamps determines the profit or loss of the Post Office Department. The amounts paid to the railroads and the airlines for carrying the mail are determined by the Interstate Commerce Commission and the Civil Aeronautics Board. The railroads now receive about 3.07 cents per ton-mile for carrying first-class mail. The four major airlines obtain about 45 cents per ton-mile. Recent studies indicate that this rate of payment exceeds costs to the airlines by at least 50 per cent. The amount of subsidy received via mail payments by the twelve lesser airlines is much greater. They receive about 92 cents per ton-mile. All-American Aviation, the experimental mail pick-up service, is paid $12.87 per ton-mile. The average mail payment for all the seventeen major domestic airlines amounts to 52.13 cents per ton-mile.

The airlines contribute little or nothing to the general upkeep of government by way of taxes. Their principal contribution lies in gasoline taxes, and these amounted to only 1.5 million dollars in 1940—a very nominal airway user charge. The total cost of operating the Federal airways was over 16 million dollars in the corresponding fiscal year, but only one-half of this 1.5 million tax contribution went to the Federal Government. The enormous airport developments, unlike railroad terminals, are invariably municipally or government owned and cause tax loss rather than the creation of new revenues. Concurrently, the noise and congestion of airport traffic tends to depress property values and property development in the locality, usually

one which would normally be comprised of expensive suburban dwellings. This results in still further decreases in tax returns.

The enormous subsidies to motor, water, and air transportation give these media a tremendous competitive advantage over the unsubsidized railroads. The solution to this competitive inequality is not to be found in equalizing the subsidy to motor, water, and air carriers with subsidies to railroads. The remedy lies in ending all subsidies. No mode of transportation, which is competitive with the railroads today, is still in a development period during which subsidies are justified. It is highly important to a healthy transportation system in this country that all the agencies be made self-supporting. Otherwise, free enterprise will perish in the transportation field.

VI

One reason the Federation for Railway Progress was formed in February, 1947, was to implement the National Transportation Policy contained in the Act of 1940. At that time, it was stated that the new Federation sought:

(1) To inform the public about all matters pertaining to American railroads, and particularly to keep before them the facts regarding any deterrents to the full accomplishment of the purposes of the Federation;

(2) To modernize railroad equipment and facilities and otherwise improve railroad passenger and freight services so that the public will have available a more efficient transportation system in the interest of the national safety and the public convenience;

(3) To bring about an equitable balance among wages, return on investment, and rates in the railroad industry so that employees, investors, and the shipping and traveling public will all receive fair treatment;

(4) To staff railroad management with progressive, energetic, efficient personnel who have full confidence in the future of railroads in the United States;

(5) To abolish monopolistic practices and bring about the return of free enterprise to the railroad industry.

In activating this first goal, the new Federation for Railway Progress plans to prevent freight-rate muddles and railroad muddles of every sort in the future. Already through its monthly publication, *Railway Progress,* the Federation has begun to concern itself with *all* aspects of the railroad industry and to regard them clinically.

Considerable sentiment exists for revision of the regulatory acts and for the reorganization of the regulatory bodies. Some feel that the dissatisfaction which exists with the administrative malpractice of the Interstate Commerce Commission on the one hand, and the pampering by the Civil Aeronautics Board on the other, can best be eliminated by placing all the forms of transportation under one new regulatory body.

Certainly as a minimum program the activities of the Government in the business

of transportation should be subjected to the same standards which apply to transportation agencies privately owned and operated. Government programs which aid transportation should be carefully evaluated in the light of public need, financial soundness, and possible detrimental effect upon existing carriers. Taxation should not continue to put any one form of transportation at a disadvantage such as it now imposes on the railroads. The public interest definitely requires the imposition of reasonable user charges on trucks, busses, vessels, and airplanes so that competition may be equalized and the Government may be fairly compensated for its expenditures in providing the facilities which are used by these types of carriers for private profit. Generally, the inherent advantages of each of the modes of transportation must not be thrown out of balance by the creation of new and dangerous artificial disadvantages. Our system will not wax strong if we continue to deny a healthful ration to the principal agency of transportation and spoon-feed all the others.

The aim of our National Transportation Policy should be to nurture a system adequate to service *all* the transportation requirements of the United States in war and in peace. Until defects in the policy, such as those we have discussed, are corrected and the policy itself is revitalized by proper administration, there appears no adequate basis for effectively settling disputes about discrimination in the regulation of rates or in the conduct of other carrier functions.

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